STANDING OUT: A COMMONSENSE APPROACH TO STANDING FOR FALSE ADVERTISING SUITS UNDER LANHAM ACT SECTION 43(A)

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This Note analyzes the benefits and shortcomings of the varying approaches federal circuit courts have taken when determining which plaintiffs have standing to sue for false advertising under section 43(a) of the Lanham Act. Some circuits have adopted a categorical approach, focusing on the relationship of the parties, and requiring the plaintiff to be a direct competitor of the defendant that has suffered a competitive injury to have standing. Other circuits implement a quasi-categorical approach that requires the plaintiff to have a reasonable interest in being protected by the Act and a reasonable belief that the alleged false advertising was damaging in order to have standing. Finally, other circuits have used a somewhat overlapping five-factor balancing test to determine whether the plaintiff has standing.

After conducting a thorough analysis of each approach, the author reasons that each one has significant flaws, ultimately causing uncertainty for plaintiffs contemplating litigation under the Lanham Act. As a recent example, in Phoenix of Broward, Inc. v. McDonald's Corp.*, the Eleventh Circuit reached a puzzling result that would seemingly vanquish a plaintiff's right to sue for false advertising under the Lanham Act in any market with several competitors. The author determines that none of the approaches is satisfactory and explores an innovative three-prong bright-line test designed to reconcile the legislative intent of the Lanham Act with the realities of the marketplace. The author concludes that this new test would be easier to apply than each approach currently in operation and would provide consistent and predictable results, which would also allow litigants to settle and relieve the burden on the federal court system.*

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I. INTRODUCTION

Imagine a grocer has been caught bleaching its meats and changing expiration dates to lower its costs and undercut the prices of other grocers.[1] Imagine further that this grocer runs a national advertising campaign falsely portraying its meats as being higher in quality than that of its competition. Now imagine that one of the grocer's competitors[2] brings suit for false advertising under section 43(a) of the Lanham Act to recover for profits that it lost while the grocer was engaging in this advertising campaign. Next, suppose that the court dismisses the competitor's suit against the grocer even though no other potential party is better suited to bring a claim, essentially resulting in the grocer's immunity from suit under the Lanham Act.[3]

Assume the court's reasoning in this hypothetical dismissal relied on the fact that the competitor will have difficulty proving that the false advertising caused it to lose sales because several other parties competed in the market, the presence of these other competitors could make computing damages difficult, and allowing the competitor to sue would encourage other competitors to also bring suit, causing an influx of cases into the federal courts. If a court followed this reasoning, the existence of a private remedy for false advertising under section 43(a) would be of no consequence because a party in any market with several competitors would always be free to misrepresent its own goods or services without fear of suit. Yet this "troubling"[4] result mirrors the Eleventh Circuit's conclusion in its recent opinion *Phoenix of Broward, Inc. v. McDonald's Corp*.[5]

1. For an example of this actually happening, see *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

2. For the sake of argument, assume this competitor did not engage in similar practices. If it did, there would be no market inequalities between the two parties and no need for a lawsuit. Intended or not, section 43(a) functions to discourage false advertising in general and to provide competitors with the means to equalize the market without also resorting to false advertising. *See* Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 16–18 (1992); James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1094 (1995).

3. This also results from the general bar against consumer suits. *See* discussion *infra* note 51 and accompanying text.

4. LAWRENCE I. WEINSTEIN & ALEXANDER KAPLAN, ELEVENTH CIRCUIT ISSUES IMPORTANT DECISION ON STANDING TO ASSERT LANHAM ACT FALSE ADVERTISING CLAIMS 3–4 (2007), *available at* http://www.proskauer.com/news_publications/client_alerts/content/2007_07_10 (follow link to .pdf).

5. 489 F.3d 1156, 1173 (11th Cir. 2007) (holding that a Burger King franchisee could not sue McDonald's because of the presence of other competitors in the market, making causation attenuated and damages speculative, difficult to apportion, and potentially duplicative), *cert. denied*, 128 S. Ct. 1647 (2008); *see* Griffith B. Price, Jr., Phoenix of Broward, Inc. v. McDonald's Corporation*: Judicious Application of the Doctrine of Prudential Standing, or Unjustified Abstention from the Proper Exercise of Jurisdiction?*, 97 TRADEMARK REP. 1332, 1361–65 (2007); Joanna A. Krawczyk, Note, Phoenix of Broward, Inc. v. McDonald's Corp.*: What Does It Take to Have Standing Under the Lanham Act?*, 10 TUL. J. TECH. & INTELL. PROP. 363, 371–72 (2007).

Congress, in 1947, codified false advertising law in section 43(a) of the Lanham Act[6] to create federal law for unfair competition after the perceived elimination of federal unfair competition common law by the Supreme Court in *Erie Railroad v. Tompkins*.[7] Since then, section 43(a)[8] "has risen from obscurity as a largely ignored subsection . . . to today's unrivaled legal instrument to combat unfair competition."[9] Still, courts disagree strongly over what types of parties may sue under section 43(a).[10]

The original standing analysis for a common law false advertising claim often led to the result described above because it required plaintiffs to show actual injury in the form of lost customers due to a defendant's alleged false advertising.[11] This requirement became known as the "single source" rule, wherein a plaintiff, to have standing, would have to prove that a misrepresented product was not available from any other source.[12] Yet Congress adopted extremely broad language for standing when it passed section 43(a), providing standing to "any person who believes that he or she is or is likely to be damaged."[13] Courts have thus interpreted the statutory false advertising cause of action as allowing a wider range of plaintiffs to bring suit.[14]

Since the passage of section 43(a), courts have had some difficulty defining the boundaries of this broader range of plaintiffs.[15] Additionally, because section 43(a) was passed with scant legislative history,[16] courts depend almost exclusively on the statutory language to determine legislative intent.[17] Consequently, courts have relied on their own deter-

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6. The Lanham Act is codified at 15 U.S.C. §§ 1051–1141 (2000).

7. 304 U.S. 64 (1938); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:7 (4th ed. 2007). In *Erie*, the Court held that "[t]here is no federal general common law," virtually eliminating federal unfair competition common law. *Erie*, 304 U.S. at 78; 5 MCCARTHY, *supra*, § 27:7.

8. Section 43(a) of the Lanham Act is codified at 15 U.S.C. § 1125(a). The original version of the Lanham Act, passed in 1946, did not include the false advertising prong of section 43(a), but courts still generally recognized a cause of action for false advertising under that section. Bruce P. Keller, *"It Keeps Going and Going and Going": The Expansion of False Advertising Litigation Under the Lanham Act*, 59 LAW & CONTEMP. PROBS. 131, 131–33 (1996). It was not until 1988, when Congress passed the Trademark Law Revision Act (hereinafter "TLRA"), Pub. L. No. 100-667, 102 Stat. 3935 (1988), that the language of section 43(a) reflected the section's applicability to false advertising. Keller, *supra*, at 134–37.

9. J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, 59 LAW & CONTEMP. PROBS. 45, 46 (1996).

10. *See Phoenix*, 489 F.3d at 1163–67 (evaluating the different circuits' approaches to standing under section 43(a)).

11. McCarthy, *supra* note 9, at 55.

12. *Id.*

13. 15 U.S.C. § 1125(a); McCarthy, *supra* note 9, at 56–57.

14. Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692–93 (2d Cir. 1971); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649, 651 (3d Cir. 1954).

15. McCarthy, *supra* note 9, at 55–57.

16. *Id.* at 56. The Lanham Act as a whole has a very detailed legislative history. Yet courts have found this history unhelpful in deciding section 43(a) issues due to the almost complete lack of history on the particular section. *Colligan*, 442 F.2d at 689–91.

17. McCarthy, *supra* note 9, at 56.

minations of the Lanham Act's purpose when deciding what types of parties should have standing to sue for false advertising under section 43(a) and have developed their own tests for standing consistent with these decisions.[18] Variances in these determinations, however slight, have caused circuits to differ greatly in their conclusions on how courts should properly determine which types of parties should be allowed to bring suit under section 43(a).[19]

This Note proposes that the Supreme Court resolve the circuit split regarding prudential standing under section 43(a) of the Lanham Act. This Note briefly discusses the concept of prudential standing, explains Congress's incorporation of the common law principles of prudential standing into the Lanham Act, and details the development of each circuit's approach.[20] This Note then analyzes the three main approaches circuit courts have taken to determine standing under section 43(a), introduces the major points of contention between the courts, and makes note of the advantages and disadvantages of each approach.[21] Last, this Note proposes a new approach to standing that incorporates the benefits of each approach and addresses both the shortcomings of each approach and the overriding policy concerns of the courts.[22]

II. BACKGROUND

Standing is the ability of a litigant "to invoke the power of a federal court."[23] Unless a party has standing, a court will not consider the merit of that party's claim.[24] The doctrine of standing is based on "concern about the proper—and properly limited—role of the courts in a democratic society."[25] The doctrine of standing consists of two components:[26] constitutional standing under Article III of the United States Constitution,[27] and prudential standing,[28] the focus of this Note.

18. *See, e.g.*, Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 234–35 (3d Cir. 1998) (noting that the Lanham Act focuses on commercial injuries and concluding that a plaintiff must allege a harm to its goodwill or reputation); *Colligan*, 442 F.2d at 691–92 (finding that Congress, in passing the Lanham Act, intended to protect purely commercial interests and holding that, as a result, plaintiffs must be part of a commercial class, i.e., not consumers).

19. *Compare* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (holding that plaintiffs must show both competition and commercial injury to sue for false advertising and that only actual competitors have standing), *with Conte Bros.*, 165 F.3d at 232–34 (rejecting the Ninth Circuit's approach and holding that a noncompetitor may potentially sue with a showing of injury to its commercial interests).

20. *See infra* Part II.

21. *See infra* Part III.

22. *See infra* Part IV.

23. Allen v. Wright, 468 U.S. 737, 750 (1984).

24. *Id.* at 751.

25. Warth v. Seldin, 422 U.S. 490, 498 (1975).

26. *Id.*; *see Allen*, 468 U.S. at 751.

27. U.S. CONST. art. III, § 2.

28. *Warth*, 422 U.S. at 500–01; *see* FEC v. Akins, 524 U.S. 11, 20 (1998) (applying prudential standing doctrine under the Federal Election Campaign Act).

Constitutional standing concerns the power of a court to hear the case at hand.[29] To establish constitutional standing under Article III, a litigant must demonstrate a "case or controversy" by showing that (1) she suffered injury in fact,[30] (2) the defendant's conduct caused her injury,[31] and (3) a favorable decision will likely redress the injury.[32] But even if a litigant meets the standards of Article III, courts may decline to entertain the litigant's claim when she does not meet additional prudential considerations.[33]

Prudential standing is a mechanism that a court may use to further limit the exercise of its jurisdiction beyond the boundaries of Article III.[34] As expressed by the Supreme Court, the doctrine of prudential standing "embraces several judicially self-imposed limits on the exercise of federal jurisdiction."[35] Unlike Article III standing, prudential standing does not have set requirements.[36] Instead, courts specifically tailor prudential standing analysis to restrict standing to those litigants who are best suited to bring the particular claim.[37] Common prudential standing requirements are that (1) a litigant must assert her own legal rights as opposed to the rights of third parties, (2) a claim may not be merely an abstract question that amounts to a generalized grievance, and (3) a litigant must be within the "zone of interests" contemplated by Congress when it created the particular cause of action.[38] Also unlike Article III standing, Congress may expressly abrogate prudential standing from statutes.[39] Still, courts presume that Congress has incorporated prudential standing into the Lanham Act in the absence of language indicating otherwise.[40]

In passing the Lanham Act, Congress provided a statutory scheme for the law of trademarks and unfair competition.[41] In addition, Congress created a federal cause of action for unfair competition and false advertising in section 43(a) of the Act.[42] Section 43(a)(1) provides,

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29. *Warth*, 422 U.S. at 498.

30. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

31. This requirement is only that the "injury . . . fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," not that the plaintiff must prove causation at the pleading stage. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

32. *Lujan*, 504 U.S. at 561.

33. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985).

34. Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 99–100 (1979).

35. Allen v. Wright, 468 U.S. 737, 751 (1984).

36. Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 225–26 (3d Cir. 1998) ("No single formula is capable of answering every prudential standing question.").

37. *Phillips Petroleum*, 472 U.S. at 804 (quoting *Gladstone*, 441 U.S. at 99–100).

38. *Id.* at 804; Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970); *Conte Bros.*, 165 F.3d at 226.

39. Bennett v. Spear, 520 U.S. 154, 163–64 (1997); *Conte Bros.*, 165 F.3d at 227.

40. *Bennett*, 520 U.S. at 163. For a detailed discussion of the incorporation of prudential standing principles into the Lanham Act, see *Conte Bros.*, 165 F.3d at 227–30.

41. *Conte Bros.*, 165 F.3d at 229; Lynda J. Oswald, *Challenging the Registration of Scandalous and Disparaging Marks Under the Lanham Act: Who Has Standing to Sue?*, 41 AM. BUS. L.J. 251, 257–58 (2004).

42. *Conte Bros.*, 165 F.3d at 229.

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
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> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
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> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.[43]

While prong (a)(1)(A) contains the false association cause of action and (a)(1)(B) contains the false advertising cause of action, the language for standing applies to both prongs.[44] Thus, the plain language of the statute indicates that Congress intended to confer standing on "any person who believes that he or she is or is likely to be damaged" under either prong.[45]

In addition to the language provided in section 43(a), Congress included a purpose clause in section 45 of the Lanham Act, declaring its intent in passing the Lanham Act:

> The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; *to protect persons engaged in such commerce against unfair competition*; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations.[46]

This statement of intent indicates that Congress was concerned primarily with protecting commercial interests when it passed section 43(a).[47] Still, neither section indicates Congressional intent to negate the common law

43. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000).

44. Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005); Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 285–86 (2007).

45. 15 U.S.C. § 1125(a); *Conte Bros.*, 165 F.3d at 225.

46. 15 U.S.C. § 1127 (emphasis added).

47. *See Conte Bros.*, 165 F.3d at 229; *accord* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 561 (5th Cir. 2001).

principles of prudential standing.[48] As a result, courts regard those rules as incorporated into the Lanham Act.[49]

Applying prudential standing principles to the Lanham Act, courts have limited standing far beyond the plain language of section 43(a).[50] For example, courts categorically exclude consumers as an entire class of litigants even though consumers would meet the "any person" standard.[51] Beyond this exclusion, however, courts have not come to a consensus on which parties *do* have standing to sue.[52] Some courts have further narrowed the scope of the standing rules to prevent retailers from bringing suit against manufacturers[53] and even to prevent direct competitors from suing in certain circumstances.[54] Conversely, other courts have construed the Act to grant standing to all direct competitors almost *per se*.[55]

Courts have reached these varying results by applying three different tests to determine whether a plaintiff has prudential standing to sue for false advertising under the Lanham Act.[56] The Seventh, Ninth, and Tenth Circuits apply a categorical approach;[57] the First and Second Circuits apply a quasi-categorical two-prong test;[58] and the Third, Fifth, and Eleventh Circuits apply a five-factor balancing test.[59] The Fourth, Sixth,

48. *Conte Bros.*, 165 F.3d at 230.

49. For a detailed analysis of this issue, see *id.* at 227–31; *see also* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1163 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008); *Procter & Gamble*, 242 F.3d at 561–62.

50. *See, e.g.*, Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 693–94 (2d Cir. 1971) (holding against a literal interpretation of section 43(a)).

51. 1 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 2:8 (4th ed. 2007); *see* Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1175–77 (3d Cir. 1993); PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120, 125–26 (2d Cir. 1984). There is some contrary authority. *See, e.g.*, Arnesen v. Raymond Lee Org., Inc., 333 F. Supp. 116, 120 (C.D. Cal. 1971) ("As long as the consumer is within the class to be protected by the Act, there is, absent legislative intent to the contrary, no reason why he should not be able to sue for his own protection, and to recover damages."). In addition, explicit language extending standing to consumers was actually considered and rejected in the passing of the TLRA in 1988. 5 MCCARTHY, *supra* note 7, § 27:39. Many courts use this legislative history to determine that Congress did not intend to extend standing to consumers. *See, e.g.*, *Serbin*, 11 F.3d at 1177–78.

52. *Compare* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (requiring the plaintiff to be a direct competitor of the defendant), *with Conte Bros.*, 165 F.3d at 235 (preventing a retailer of motor oil from suing a manufacturer), *and* Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11–12 (1st Cir. 1986) (allowing a nonprofit corporation representing cashmere retailers and manufacturers to sue another cashmere manufacturer).

53. *See Conte Bros.*, 165 F.3d at 235.

54. *See Phoenix*, 489 F.3d at 1173 (holding that a Burger King franchisee did not have standing to sue McDonald's based on a finding of attenuated causation, speculative damages, difficulty in apportioning damages, and substantial risk of duplicative damages).

55. *Jack Russell*, 407 F.3d at 1037; Hutchinson v. Pfeil, 211 F.3d 515, 520–22 (10th Cir. 2000).

56. *See Phoenix*, 489 F.3d at 1164–66 (describing the three approaches).

57. *Id.* at 1164–65; *see Jack Russell*, 407 F.3d at 1037; *Hutchinson*, 211 F.3d at 520; L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc., 9 F.3d 561, 575 (7th Cir. 1993).

58. *Phoenix*, 489 F.3d at 1165; *see* ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 169 (2d Cir. 2007); Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11–12 (1st Cir. 1986).

59. *See Phoenix*, 489 F.3d at 1167–73; Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 562–63 (5th Cir. 2001); Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233 (3d Cir. 1998).

Eighth, and D.C. Circuits have not yet officially adopted a particular test for standing.[60] Still, a district court within the Sixth Circuit has applied a test similar to that of the First and Second Circuits,[61] the United States District Court for the District of Columbia has applied a categorical test,[62] and the Fourth and Eighth Circuits have both acknowledged the split without adopting a particular test.[63]

A. The Development of the Categorical Approach

The Seventh, Ninth, and Tenth Circuits essentially hold that the plaintiff in a false advertising case "must be in 'actual' or 'direct' competition with the defendant" to have standing to bring a false advertising claim.[64] Specifically, these circuits hold that only actual competitors have standing to sue and that those direct competitors must have suffered a competitive injury.[65] The Seventh Circuit, however, arrived at its conclusion apart from the Ninth and Tenth Circuits and applies a slightly different test. Therefore, the reasoning of the Seventh Circuit is detailed separately from the reasoning of the Ninth and Tenth Circuits.

1. Seventh Circuit Jurisprudence

The Seventh Circuit first developed its test for standing under section 43(a) in *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*[66] In *Dovenmuehle*, a privately owned corporation bearing a family's surname, Dovenmuehle, Inc., was eventually sold to the defendant, Gilldorn, in a series of transfers.[67] After acquiring Dovenmuehle, Inc., Gilldorn planned to adopt the Dovenmuehle name, but plaintiffs—members of the Dovenmuehle family, most of whom were not involved in the original Dovenmuehle, Inc.—brought suit under section 43(a) of the Lanham Act to prevent Gilldorn from doing so.[68] The trial court dismissed the claim for lack of standing, and the Seventh Circuit agreed on appeal, reasoning that "[n]one of the plaintiffs [was] engaged in competition, even indirectly, with the defendants,"[69] and none was "even arguably engaged in

60. *See* WEINSTEIN & KAPLAN, *supra* note 4, at 2 n.3.
61. *See* Logan Farms v. HBH, Inc. Del., 282 F. Supp. 2d 776, 797 (S.D. Ohio 2003) ("All that is required [for standing] is that [the plaintiff] have a reasonable interest in being protected against false advertising.").
62. *See* Alpo Petfoods, Inc. v. Ralston Purina Co., 720 F. Supp. 194, 213 (D.D.C. 1989) (holding that "direct competitors in the puppy food market . . . clearly have standing to sue"), *rev'd in part on other grounds*, 913 F.2d 958 (D.C. Cir. 1990).
63. *See* Am. Ass'n of Orthodontists v. Yellow Book USA, Inc., 434 F.3d 1100, 1103–04 (8th Cir. 2006); Made in the USA Found., Inc. v. Phillips Foods, Inc., 365 F.3d 278, 279–81 (4th Cir. 2004).
64. WEINSTEIN & KAPLAN, *supra* note 4, at 1.
65. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005); Hutchinson v. Pfeil, 211 F.3d 515, 520 (10th Cir. 2000).
66. 871 F.2d 697 (7th Cir. 1989).
67. *Id.* at 698–99.
68. *Id.*
69. *Id.* at 700.

commercial activities."[70] The court thus grounded its opinion in the fact that the plaintiff was not a commercial entity and required at least some showing of competition between the parties.

Several years later, the Seventh Circuit again touched upon the question of standing under the Lanham Act in *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*,[71] but did so without citing its opinion in *Dovenmuehle*.[72] The Seventh Circuit held that "[i]n order to have standing to allege a false advertising claim, . . . the plaintiff must assert a discernible competitive injury."[73] The court further noted that the plaintiff, Heath, did not have standing to sue AT & T "[b]ecause Heath [was] not . . . a competitor of AT & T."[74] The Seventh Circuit thus seemed to hold that noncompetitors do not have standing to sue for false advertising *per se*, again basing its decision on the fact that the plaintiff and the defendant, both commercial entities, were not in competition with each other.

In *Johnny Blastoff, Inc. v. Los Angeles Rams Football Co.*,[75] the court integrated its opinions in *Dovenmuehle* and *Heath* by holding that a plaintiff must demonstrate "a reasonable interest to be protected against conduct violating the Act"[76] and assert "a discernable competitive injury."[77] Therefore, the Seventh Circuit apparently adopted a two-part test requiring a plaintiff show both (1) a reasonable interest in protection against the alleged false advertising and (2) a competitive injury, but the court has left unclear whether a plaintiff can establish a reasonable interest *by* exhibiting a competitive injury.[78]

2. *Ninth and Tenth Circuit Jurisprudence*

In an early line of cases, the Ninth Circuit developed its approach to standing under section 43(a) by first looking to the statutory language

70. *Id.* at 701.

71. 9 F.3d 561 (7th Cir. 1993). In *Heath*, a candy manufacturer brought suit against AT & T under the false advertising prong of the Lanham Act because AT & T published an advertisement in which Heath endorsed AT & T—an advertisement that Heath approved of at the time it was made but later regretted.

72. *See id.*

73. *Id.* at 575.

74. *Id.*

75. 188 F.3d 427 (7th Cir. 1999). In *Blastoff*, the plaintiff brought suit against the Rams alleging, *inter alia*, that the Rams violated the Lanham Act through trademark notices printed on the Rams's merchandise. *Id.* at 438. The court skeptically remarked that Blastoff believed its allegations "somehow amounted to deceptive advertising." *Id.*

76. *Id.* (quoting Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 700) (7th Cir. 1989)).

77. *Id.* (quoting *Heath*, 9 F.3d at 575).

78. The court did not specifically formulate a two-part test, and the holding in *Blastoff* could arguably be construed to declare that a plaintiff could show a reasonable interest in protection *by* asserting competitive injury. *See id.* Either way, competitive injury would be a necessary showing in the Seventh Circuit. Further, given the court's precedent in *Heath*, the court seems to believe that actual competition between the parties is a prerequisite to a showing of competitive injury. *See id.*

providing standing to "any person who believes that he or she is likely to be damaged."[79] Based on this broad language, the court adopted a general test for prudential standing: "[W]hether [a] party 'has a reasonable interest to be protected against false advertising.'"[80] In addition, the court expressly rejected the contention that the plaintiff had to be in competition with the defendant or even that standing was limited to commercial entities.[81]

But the Ninth Circuit departed from this early line of cases in *Halicki v. United Artists Communications, Inc.*[82] In *Halicki*, the court looked beyond the language of section 43(a) to section 45, in which Congress declared its intent in enacting the Lanham Act to be, among other things, "to protect persons engaged in . . . commerce against unfair competition."[83] Based on this language, the court concluded that "[t]o be actionable, conduct must not only be unfair, but must in some discernable way be competitive."[84] Thus, the court in *Halicki* held that the plaintiff did not have standing because he was not in competition with the defendant.[85]

The Ninth Circuit attempted to reconcile the differences between *Halicki* and its earlier line of cases in *Waits v. Frito-Lay, Inc.*[86] by establishing different tests for standing under section 43(a)(1)(A) and section 43(a)(1)(B).[87] The court held that noncompetitors may sue for false endorsement under section 43(a)(1)(A), though a showing of competitive injury is necessary for a false advertising claim under section 43(a)(1)(B).[88] The court first argued that a "wrongful appropriator" is, in a sense, a competitor of the celebrity whose identity is at the center of a false endorsement conflict because both parties compete to use that celebrity's identity.[89] Still, the court eventually found it necessary to draw a distinction between the two prongs because requiring competition in the

79. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000); *see* Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981).

80. *Smith*, 648 F.2d at 608 (quoting 1 R. CALLMANN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 18.2(b) (3d ed. 1967)).

81. *See id.* at 607; Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 151 (9th Cir. 1963).

82. 812 F.2d 1213 (9th Cir. 1987). In *Halicki*, a movie producer brought suit against movie theaters that advertised his movie as being rated R, when it was actually rated PG. *Id.* at 1213.

83. *Id.* at 1214 (quoting 15 U.S.C. § 1127).

84. *Id.* This reasoning has been sharply criticized. *See infra* text accompanying note 184.

85. *Halicki*, 812 F.2d at 1214 ("Halicki failed to show injury by a competitor.").

86. Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992). *Waits* concerned a claim of false endorsement under section 43(a)(1)(A), rather than false advertising under section 43(a)(1)(B), for Frito-Lay's use of an imitation of singer Tom Waits's voice in a radio advertisement. *Id.* at 1097.

87. *Id.* at 1109.

88. *Id.* This holding was followed by the Seventh Circuit in *Heath* and by the Tenth Circuit in *Stanfield*, but was sharply criticized by the Third Circuit in *Conte Bros.* as being baseless. *See* Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.2d 221, 232–33 (3d Cir. 1998); Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 873 (10th Cir. 1995); L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc., 9 F.3d 561, 575 (7th Cir. 1993).

89. *Waits*, 978 F.2d at 1110.

traditional sense under section 43(a)(1)(A) would prevent celebrities from ever being able to sue for false endorsement.[90]

The differences in the Ninth Circuit precedent were further reconciled in *Barrus v. Sylvania*[91] and *Jack Russell Terrier Network of Northern California v. American Kennel Club, Inc.*[92] In *Barrus*, the court simply reaffirmed its opinion in *Waits* and held that a group of consumers lacked standing to sue.[93] In *Jack Russell*, however, the court explicitly adopted a two-part test for standing under section 43(a)(1)(B), requiring the plaintiff to show "(1) a commercial injury based upon a misrepresentation about a product; and (2) that the injury is 'competitive,' or harmful to the plaintiff's ability to compete with the defendant."[94] The court may have somewhat moderated its holding in *Halicki* by replacing the requirement of actual competition with a showing of competitive injury, but this particular point of law is in flux.[95] Therefore, the Ninth Circuit has developed its test for standing under section 43(a)(1)(B) based primarily on the policy of properly limiting the Lanham Act, but created a separate test for standing under section 43(a)(1)(A) based on the policy of allowing injured celebrities to sue for false endorsement when they do not compete with the defendant in the traditional sense.

The Tenth Circuit first developed its test for standing in *Stanfield v. Osborne Industries, Inc.*[96] In *Stanfield*, the court relied heavily on *Waits* in holding that a plaintiff must be a competitor of the defendant and allege a competitive injury to have standing to bring a false advertising claim under section 43(a).[97] In addition, the court followed *Waits* in adopting separate tests for standing under each prong of section 43(a).[98]

90. *Id.*; *see also* Smith v. Montoro, 648 F.2d 602, 608 (9th Cir. 1981); Felix H. Kent, *Standing to Sue Under Lanham Act Section 43(a)*, N.Y. L.J., Feb. 19, 1999, at 3 (discussing celebrity lawsuits).

91. 55 F.3d 468 (9th Cir. 1995).

92. 407 F.3d 1027 (9th Cir. 2005). In *Jack Russell*, the court denied standing to two individual dog breeders who brought suit against a national breed club for running a "blacklisting" advertisement against them. *Id.* at 1036–37.

93. *Barrus*, 55 F.3d at 469–70.

94. *Jack Russell*, 407 F.3d at 1037; *Barrus*, 55 F.3d at 470. Prior to the decision in *Jack Russell* but after *Barrus*, district courts within the Ninth Circuit applied a three-part test derived from *Waits* and *Halicki*, requiring (1) actual competition between the plaintiff and defendant, (2) competitive injury, and (3) implication of the Lanham Act's purpose. New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1116 (C.D. Cal. 2004); Kournikova v. Gen. Media Commc'ns, Inc., 278 F. Supp. 2d, 1111, 1117 (C.D. Cal. 2003).

95. *Compare Jack Russell*, 407 F.3d at 1037 (holding that a plaintiff's injury must be competitive in the sense that it is "harmful to the plaintiff's ability to compete with the defendant"), *with* Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999) (holding that the crux of *Halicki* was not that the plaintiff must be in competition with the defendant, but that the plaintiff must show competitive injury).

96. 52 F.3d 867 (10th Cir. 1995). *Stanfield* concerned a matter between a product designer, Stanfield, and a manufacturer, Osborne. *Id.* Stanfield sued Osborne for using the mark "Stanfield" on its products when Stanfield had originally insisted on the use of his name but after discontinuing employment at Osborne, wished that use to cease. *Id.* at 870.

97. *Id.* at 873.

98. *Id.*

Later, in *Hutchinson v. Pfeil*,[99] the Tenth Circuit echoed its holding in *Stanfield*.[100] The holding in *Hutchinson* was actually based on Article III, making its discussion on prudential standing dicta.[101] Still, the court stated that both actual competition and competitive injury would have been required for prudential standing.[102]

Therefore, both the Ninth and Tenth Circuits apply the same test to false advertising claims by requiring a showing of (1) commercial injury and (2) actual competition.[103] The Seventh Circuit applies a slightly different but substantially similar test requiring (1) a reasonable interest and (2) a competitive injury. Even though the Seventh Circuit does not necessarily require a plaintiff to be an actual competitor *per se*, both requirements focus on competition between the parties. Notably, these tests focus on the nature of the relationship between the parties and have the effect of restricting standing solely to commercial entities and generally to entities that compete directly.

B. The Development of the Quasi-Categorical Approach

Unlike the Seventh, Ninth, and Tenth Circuits, the First and Second Circuits do not require competition between the plaintiff and defendant for standing.[104] Instead, the First and Second Circuits rely more heavily on the plaintiff's reasonable interest in being protected under the Act against false advertising by focusing on the nature of the injury alleged.[105]

The First Circuit first touched on the issue of standing under section 43(a) in *Quabaug Rubber Co. v. Fabiano Shoe Co*.[106] but did not provide a specific test for standing until its decision in *Camel Hair & Cashmere Institute of America, Inc. v. Associated Dry Goods Corp*.[107] In *Camel Hair*, the court allowed a nonprofit corporation consisting of cashmere retailers and manufacturers to bring suit on behalf of its members against a clothing manufacturer when that manufacturer misrepresented the amount of cashmere in its fabrics.[108] The court acknowledged the lack of competition between the plaintiffs and the defendant, but allowed stand-

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99. 211 F.3d 515 (10th Cir. 2000). In *Hutchinson*, standing was denied when the plaintiff alleged that the defendants were representing a forged painting as authentic, harming his ownership interest in the authentic painting even though the actual existence of the authentic painting was undetermined. *Id.* at 520.

100. *Id.* (quoting *Stanfield*, 52 F.3d at 873).

101. *Id.* at 519–21.

102. *Id.* at 520.

103. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1164–65 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).

104. *Id.* at 1165; WEINSTEIN & KAPLAN, *supra* note 4, at 1–2.

105. WEINSTEIN & KAPLAN, *supra* note 4, at 2.

106. 567 F.2d 154 (1st Cir. 1977). In *Quabaug*, the court simply allowed a manufacturer of boot soles to sue a retailer for falsely advertising that its boots contained soles manufactured by the plaintiff.

107. 799 F.2d 6, 11–12 (1st Cir. 1986); *see Quabaug*, 567 F.2d at 160.

108. *Camel Hair*, 799 F.2d at 10–12.

ing, noting that "there appears to be a general consensus that the plaintiff does not have to be a competitor in order to have standing to sue."[109] Instead, the court held that a plaintiff must show both (1) "a reasonable interest in being protected against false advertising" and (2) "a link or 'nexus' between itself and the alleged falsehood" for standing under section 43(a).[110] Although the court did not define what a reasonable interest would be, the plaintiffs' reasonable interest in *Camel Hair* was that of vendors and manufacturers preserving the reputation of their products.[111] It therefore seems clear that the plaintiff must still face some type of commercial harm in order to have a reasonable interest in protection under section 43(a).[112]

Notably, the Second Circuit was the first of the circuit courts to weigh in on the issue of consumer standing under section 43(a) in the oft-cited *Colligan v. Activities Club of New York, Ltd.*[113] Yet over two decades passed before the court developed its actual test for standing in *Ortho Pharmaceutical Corp. v. Cosprophar, Inc.*[114] In *Ortho*, the Second Circuit applied holdings from its prior opinions to develop a two-part test requiring plaintiffs to show (1) "a 'reasonable interest to be protected' against the advertiser's false or misleading claims"[115] and (2) "a 'reasonable basis' for believing that this interest is likely to be damaged by the false or misleading advertising."[116] In *Telecom International America, Ltd. v. AT & T Corp.*,[117] the court departed from its precedent in *Ortho* by holding that a plaintiff "must be a competitor of the defendant and allege a competitive injury" in order to have standing.[118] Still, in *ITC Ltd. v. Punchgini, Inc.*,[119] the court reaffirmed its holding in *Ortho*, making the two-prong test the apparent law of the jurisdiction.[120]

In *ITC*, the court also defined a reasonable interest under the first prong of the *Ortho* test as "commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive in-

109. *Id.* at 11.

110. *Id.* at 11–12. A district court within the First Circuit, however, recently took a more categorical approach. *See* Encompass Ins. Co. of Mass. v. Giampa, 522 F. Supp. 2d 300, 310 (D. Mass. 2007) ("[T]he law is clear in the First Circuit that the plaintiff must assert some type of *competitive injury* to state a claim for false advertising under the Act.") (emphasis added).

111. *Camel Hair*, 799 F.2d at 12.

112. *Cf. Encompass*, 522 F. Supp. 2d at 311.

113. 442 F.2d 686 (2d Cir. 1971). In *Colligan*, the Second Circuit held that consumers do not have standing to sue for false advertising. *Id.* at 691–92.

114. 32 F.3d 690, 694 (2d Cir. 1994).

115. *Id.* (quoting PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120, 125 (2d Cir. 1984)).

116. *Id.* (quoting Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 316 (2d Cir. 1982)).

117. 280 F.3d 175 (2d Cir. 2001).

118. *Id.* at 197 (quoting Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 873 (10th Cir. 1995)). This departure was followed by subsequent cases. *See* Crab House of Douglaston, Inc. v. Newsday, Inc., 418 F. Supp. 2d 193, 213 (E.D.N.Y. 2006); Arnold Chevrolet LLC v. Tribune Co., 418 F. Supp. 2d 172, 188 (E.D.N.Y. 2006).

119. 482 F.3d 135 (2d Cir. 2007).

120. *Id.* at 169; WEINSTEIN & KAPLAN, *supra* note 4, at 2.

jury."[121] Likewise, the court provided that the second prong can be met by a plaintiff's showing "both likely injury and a causal nexus to the false advertising."[122] Thus, like the First Circuit, the Second Circuit requires a showing of commercial or competitive harm in addition to a "causal nexus" for standing under section 43(a).[123]

Therefore, both the First and Second Circuits focus on the type of injury alleged and whether it is commercial, whereas the Seventh, Ninth, and Tenth Circuits focus on the relationship between the parties and whether it is competitive.

C. The Development of the Balancing Approach

The Third, Fifth, and Eleventh Circuits have adopted a far more complex, five-factor balancing test to determine standing.[124] Under this test, courts consider:

> (1) The nature of the plaintiff's alleged injury: Is the injury of a type that Congress sought to redress in providing a private remedy for violations of the [Lanham Act]?
>
> (2) The directness or indirectness of the asserted injury.
>
> (3) The proximity or remoteness of the party to the alleged injurious conduct.
>
> (4) The speculativeness of the damages claim.
>
> (5) The risk of duplicative damages or complexity in apportioning damages.[125]

The Supreme Court originally developed this test in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* to determine standing under the Clayton Act for an antitrust violation.[126] The test was first applied to section 43(a) by the Third Circuit in *Conte Bros. Automotive v. Quaker State-Slick 50, Inc*.[127]

Although the Third Circuit was the first of the circuits to apply the above balancing test to section 43(a), its earlier decisions on the subject applied a standard similar to that of the First and Second Circuits. The Third Circuit first rendered a decision on standing under the Lanham

121. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 169 (2d Cir. 2007).

122. *Id.* at 170 (quoting Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 130 (2d Cir. 2000)).

123. *Id.* at 169–70.

124. WEINSTEIN & KAPLAN, *supra* note 4, at 2; *see* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1157, 1163–64 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008); Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 562–63 (5th Cir. 2001); Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233–36 (3d Cir. 1998).

125. *Phoenix*, 489 F.3d at 1163–64 (alteration in original) (quoting *Conte Bros*., 165 F.3d at 233).

126. 459 U.S. 519, 529 (1983).

127. *Conte Bros.*, 165 F.3d at 233.

Act in *Thorn v. Reliance Van Co.*[128] In *Thorn*, the court rejected the notion that only competitors had standing by holding that any party that had "a reasonable interest to be protected against false advertising" could sue.[129] The court followed *Thorn* in *Serbin v. Ziebart International Corp.* and again applied the reasonable interest test.[130] In *Serbin*, however, the Third Circuit restricted its reasonable interest test by holding that consumers do not have standing to sue under section 43(a) *per se* but left open the possibility that noncompetitors could sue.[131]

With this background, in *Conte Bros.*, the Third Circuit adopted a new test for standing and became the first of the circuit courts to apply the reasoning of *Associated General Contractors* to Lanham Act claims.[132] As support for its decision, the court cited a treatise, *McCarthy on Trademarks and Unfair Competition*, and the *Restatement (Third) of Unfair Competition*, both of which recommended using the Supreme Court's analysis of prudential standing in *Associated General Contractors* as an analogy to develop a test for standing under section 43(a).[133] In *Joint Stock Society v. UDV North America, Inc.*,[134] the Third Circuit affirmed its approach in *Conte Bros.* and again applied the five-factor balancing test.[135]

The Fifth Circuit soon joined the Third Circuit in adopting the balancing test, applying it in two closely decided cases, *Procter & Gamble Co. v. Amway Corp.*[136] and *Logan v. Burgers Ozark Country Cured Hams, Inc.*[137] The Eleventh Circuit followed the Third and Fifth Circuits in *Phoenix*, accentuating the differences between the three different approaches by denying standing to a Burger King franchisee in bringing

128. 736 F.2d 929 (3d Cir. 1984).

129. *Id.* at 933 (quoting Smith v. Montoro, 648 F.2d 602, 608 (9th Cir. 1981)). With this holding, the Third Circuit distinguished its case from *Colligan* and granted standing to "an investor in a bankrupt corporation controlled by individuals who allegedly conspired to injure that corporation through false advertising." *Id.*

130. 11 F.3d 1163, 1175–76 (3d Cir. 1993).

131. *Id.* at 1177.

132. *Conte Bros.*, 165 F.3d at 233. The court used the factors to conclude that a retailer of motor oil did not have standing to sue a manufacturer who falsely advertised its product as a motor oil substitute. *Id.* at 234–35.

133. *Id.* at 233 (citing 5 MCCARTHY, *supra* note 7, § 27:32 n.1; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 3 cmt. f (1995) [hereinafter RESTATEMENT]).

134. 266 F.3d 164 (3d Cir. 2001).

135. *Id.* at 179–80. In *Joint Stock Society*, the Third Circuit used the *Associated General Contractors* test to deny standing to a Russian vodka producer attempting to sue an American vodka producer for using its distinctive marks—specifically its trade name and an insignia associated with its vodka—on an inferior product. *Id.* at 170–71, 174–80. The court did so by finding that the injuries were indirect and that the plaintiff was remote from the alleged conduct. *Id.* at 185.

136. 242 F.3d 539, 562–64 (5th Cir. 2001). In *Proctor & Gamble*, the Fifth Circuit denied standing to Proctor & Gamble Co. when it attempted to sue Amway Corp. for spreading rumors that Proctor was linked to Satanism, allegedly causing Proctor to lose customers and sales. *Id.* at 542–45.

137. 263 F.3d 447, 460 (5th Cir. 2001).

suit against McDonald's Corp.—a suit that almost certainly would have been allowed had the court applied the categorical approach.[138]

The claim in *Phoenix* arose out of advertisements concerning McDonald's promotional games—particularly the Monopoly game—that ran between 1995 and 2001.[139] Each of these promotional games offered McDonald's customers a chance to win prizes ranging from free food to expensive automobiles and cash prizes of up to $1 million.[140] In 2001, the FBI and United States Department of Justice revealed that at least $20 million in these high-value prizes had been embezzled between 1995 and 2001, making those prizes unavailable to McDonald's customers.[141] After this revelation, Phoenix of Broward, Inc., a Burger King franchisee, brought suit against McDonald's under section 43(a) for falsely advertising that its customers had an equal chance to win these high-value prizes.[142] The district court dismissed the case for lack of standing after finding that factors (3), (4), and (5) weighed against standing.[143] The Eleventh Circuit affirmed this decision on appeal, but held that factors (1) and (3) favored standing, while factors (2), (4), and (5) weighed against standing.[144] The Eleventh Circuit based its decision heavily on the presence of several other competitors in the fast-food market.[145]

Thus, the Third, Fifth, and Eleventh Circuits focus on a balancing of factors but do not directly inquire as to the level of competition between the plaintiff and defendant.

III. ANALYSIS

The differing approaches of each circuit may often lead to the same outcome. For example, the Third Circuit's conclusion in *Joint Stock Society* would not have changed had it applied the reasoning of the other circuits. In *Joint Stock Society*, the court denied a Russian vodka producer standing to bring suit under section 43(a) against an American vodka producer, largely because it had not taken even minimal steps to compete in the same market as the American vodka company.[146] The court reached this result using the balancing approach, finding that factors (2), (3), (4), and (5) all weighed against standing.[147]

138. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1163–64 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008); *see infra* notes 157–58 and accompanying text.

139. Phoenix of Broward, Inc. v. McDonald's Corp., 441 F. Supp. 2d 1241, 1245 (N.D. Ga. 2006), *aff'd*, 489 F.3d 1156, *cert. denied*, 128 S. Ct. 1647.

140. *Id.*

141. *Id.* For more information on the scam, see David Stout, *Eight Charged with Rigging McDonald's Prize Contests*, N.Y. TIMES, Aug. 22, 2001, at A12.

142. *Phoenix*, 441 F. Supp. 2d at 1245–46.

143. *Id.* at 1252.

144. *Phoenix*, 489 F.3d at 1173.

145. *See id.* at 1169–73.

146. Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 185 (3d Cir. 2001).

147. *Id.*

Applying the categorical approach of the Seventh, Ninth, and Tenth Circuits (focusing on a commercial injury and actual competition), the plaintiff would still have been unable to sue because, as the Third Circuit noted, (1) the plaintiff could point to no injury other than the hypothetical profits that it may have made if it had marketed its product in the United States,[148] and (2) the alleged injury was indirect, as the plaintiff and defendant sold their products in different markets and were not in actual competition.[149]

Likewise, applying the quasi-categorical approach of the First and Second Circuits (focusing on a reasonable interest in protection and a reasonable basis for believing that interest will be damaged), the plaintiff would not have had standing because (1) the plaintiff had no reasonable interest in protection because it competed in a different market than the defendant and could show no probability of injury,[150] and (2) the plaintiff could not reasonably believe that it was harmed by the defendant because it claimed only hypothetical damages.[151]

But under certain circumstances the results can vary wildly, leaving the viability of much future litigation under the Lanham Act uncertain.[152] For instance, in *Phoenix*, the Eleventh Circuit held that a Burger King franchisee did not have standing to sue McDonald's, a direct competitor.[153] The Eleventh Circuit reached this conclusion by determining that the defendant's behavior did not directly affect the plaintiff because the causal link between the alleged false advertising and the injury was highly attenuated,[154] the alleged damages were too speculative because the decline in Burger King's sales could have been attributed to other competitors,[155] and the risk of duplicative damages and the complexity of apportioning damages were high because allowing Burger King to sue would open the door for every fast-food restaurant in the market to sue.[156]

Yet under the "categorical approach," the Burger King franchisee would almost certainly have standing to sue McDonald's: (1) the injury would be commercial because the plaintiff was alleging lost sales and expenses incurred in luring back customers,[157] and (2) Burger King competes with McDonald's.[158] Likewise, under the quasi-categorical approach, the plaintiff would have standing because it (1) has a reasonable

148. *Id.* at 184.
149. *Id.* at 182–83.
150. *Id.*
151. *Id.* at 184.
152. Price, *supra* note 5, at 1360.
153. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1173 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).
154. *Id.* at 1169–70.
155. *Id.* at 1171–72.
156. *Id.* at 1172–73.
157. *Id.* at 1168.
158. *Id.* at 1171.

interest in protecting itself against a loss of customers and sales resulting from a competitor's false advertising,[159] and (2) has alleged a direct link between the false advertisements and a drop in its sales.[160] Thus, standing under section 43(a) depends heavily on which circuit hears the claim, making it clear that a consistent standard should be developed.

Before recommending a new test for standing under section 43(a), this Note analyzes in detail the benefits and drawbacks of each of the three approaches and presents each approach's effects in application. Discussion first focuses on the limits of the categorical approach, next on the problems with the quasi-categorical approach, and last on the uncertainty caused by the balancing approach.

A. The Limits of the Categorical Approach

As discussed above,[161] courts applying the categorical approach have defined a plaintiff's reasonable interest in protection under section 43(a) by looking to section 45, which states that the purpose of the Lanham Act is "to protect persons . . . against unfair competition."[162] Based on this language, courts have required that a plaintiff show that the defendant's false advertising has harmed its ability to compete with the defendant.[163] Implicitly, the plaintiff must also show that the injury was caused by the defendant's alleged false advertising.[164]

In addition to invoking the plain language of the statute, these courts have stated two main policy justifications for their approach to standing under section 43(a).[165] First, courts applying the categorical test have expressed concern that broadening the Act by extending standing to noncompetitors would dilute the statute and have the effect of creating an incredibly broad federal cause of action for misrepresentation.[166] Second, these courts have noted that denying standing to noncompetitors does not deprive them of recovery because they should be able to successfully assert other claims, such as breach of contract, if their allegations are true.[167] These courts thus base their approach to standing on

159. *Id.*

160. *Id.* at 1169. Causation could potentially fail under this analysis for standing. *See* WEINSTEIN & KAPLAN, *supra* note 4, at 3–4 (describing the plaintiff's theory of causation and damages in *Phoenix* as "highly dubious"). Still, it is questionable whether standing should fail due to difficulties that the plaintiff will have in proving causation when causation has been fairly alleged. *Id.* at 4; *see supra* note 31.

161. *See supra* Part II.A.2.

162. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1108 (9th Cir. 1992); Halicki v. United Artists Commc'ns, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987) (quoting Lanham Act § 45, 15 U.S.C. § 1127 (2000)).

163. Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005); Johnny Blastoff, Inc. v. L.A. Rams Football Co., 188 F.3d 427, 438 (7th Cir. 1999).

164. *See* Hutchinson v. Pfeil, 211 F.3d 515, 520–22 (10th Cir. 2000).

165. *See Halicki*, 812 F.2d at 1214–15.

166. *Id.* at 1214; *accord* New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1116 (C.D. Cal. 2004).

167. *Halicki*, 812 F.2d at 1215; *accord* Lemley, *supra* note 44, at 312–13.

properly narrowing the statute to prevent its dilution while recognizing that noncompetitors may have other avenues of recovery.[168]

When confronted with the unpleasant aspects of applying this strict test, some courts utilizing the categorical approach have found it necessary to develop different approaches to standing for false advertising under section 43(a)(1)(B) and false endorsement under section 43(a)(1)(A).[169] These courts justify the different standards by pointing to the statutory language of section 45, which declares that, in addition to the protections against unfair competition, the purpose of the Lanham Act is "to make 'actionable the deceptive and misleading use of marks in . . . commerce.'"[170] Courts find that both of these purposes are reflected in section 43(a)'s protections against false advertising and false endorsement, and note that different classes of plaintiffs face injury under each prong of section 43(a): competitors face injury from false advertising, whereas noncompetitors, most often celebrities, face injury from false endorsement.[171]

Generally, the categorical approach leads to clear holdings that hinge solely on whether the plaintiff and defendant are in actual competition with each other.[172] These clear holdings allow the results of this approach to be predictable, making plaintiffs less likely to file questionable claims.[173] In addition, such predictable results may encourage settlements or other private remedies, allowing the market to correct the flow of false information.[174]

Though this approach is narrow, it seems consistent with common sense that competitors would generally be the best suited parties to bring false advertising claims, so the lack of a proximity requirement may be inconsequential.[175] As case law shows, false advertisers are most likely to either falsely advertise about a competitor's product or to falsely adver-

168. As later noted by the Ninth Circuit, "the interests asserted [in *Halicki*] . . . were solely contractual and not within the zone of interests protected by the Lanham Act." Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1109 (9th Cir. 1992).

169. Stanfield v. Osborne Indus., Inc., 52 F.3d 867, 873 (10th Cir. 1995); *Waits*, 978 F.2d at 1110.

170. *Waits*, 978 F.2d at 1108 (quoting Lanham Act § 45, 15 U.S.C. § 1127 (2000)) (alteration in original).

171. *Id.* at 1108–10.

172. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (denying standing to the plaintiffs because they did not compete with the defendants even though they were the direct targets of the false advertisement); Johnny Blastoff, Inc. v. L.A. Rams Football Co., 188 F.3d 427, 438–39 (7th Cir. 1999) (denying standing to the plaintiff because it had no right to market the merchandise it hoped to use to compete with the defendant); New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1116 (C.D. Cal. 2004) (holding that the plaintiff lacked standing because it and the defendant offered "different products in different segments of the internet market").

173. *See* Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S93–94 (1997) (describing the presumption that plaintiffs will file cases only when they are likely to have something to gain).

174. *See* Lemley, *supra* note 44, at 312–14.

175. *See, e.g.*, *Jack Russell*, 407 F.3d at 1037.

tise about its own product.[176] In either case, direct competitors seem most likely and best suited to bring a claim.[177] Additionally, taking a narrow approach alleviates concerns that courts may be flooded with false advertising claims.[178]

This approach also reduces the potential for "overenforcement" of the Act, a danger that would augment, rather than reduce, market inequalities.[179] Further, the potential for "underenforcement" may be alleviated by the presence of other state-law remedies for noncompetitors such as breach of contract, fraud, and various business torts.[180] These circuits have thus developed a clear, predictable standard with consistent results that addresses the danger of overextending standing.

Still, the positions described above have been harshly criticized by other circuits and by leading scholars. Specifically, the Third Circuit has asserted that "[s]ection 43(a) provides no support for drawing a distinction in standing depending on the type of [section] 43(a) violation alleged."[181] Rather, the language "any person who believes that he or she is or is likely to be damaged by such act" applies to both prongs of section 43(a).[182] Scholars also advocate using the same criteria for standing under either prong.[183]

In his treatise on trademarks and unfair competition, J. Thomas McCarthy declares, "The passé semantic argument that there cannot be 'unfair competition' without 'competition' between the parties has often been rejected. In the author's view, this decision is an aberration in the history of court interpretation of [section] 43(a)."[184] But McCarthy may have overstated the frequency with which courts have rejected this contention: many circuits have held that the Lanham Act focuses on com-

176. Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 536 (1979); *see* Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 695–96 (2d Cir. 1994).

177. *See* Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 563–64 (5th Cir. 2001); Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 234–35 (3d Cir. 1998). *But see* Jordan & Rubin, *supra* note 176, at 551 (questioning the need for a competitor remedy for false advertising).

178. *See* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1172 (11th Cir. 2007) (evaluating the impact of standing on the federal court system and expressing concern over a flood of cases), *cert. denied*, 128 S. Ct. 1647 (2008).

179. Lemley, *supra* note 44, at 289.

180. *Id.* at 312.

181. *Conte Bros.*, 165 F.3d at 232.

182. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000); *see supra* note 44.

183. 5 MCCARTHY, *supra* note 7, § 27:9; Wrona, *supra* note 2, at 1138.

184. 5 MCCARTHY, *supra* note 7, § 27:32. McCarthy supports this contention by engaging in semantic distortions himself: "Such an argument is analogous to a defense that there can be no 'manslaughter' because the person killed was a woman, not a 'man.' Manslaughter means more than the negligent killing of a 'man' and unfair competition means more than confusion caused by a 'competitor.'" 4 MCCARTHY, *supra* note 7, § 24:14. This argument should be entirely disregarded. The use of "man" in "manslaughter" refers to "an individual human" rather than "an adult male human." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 705 (10th ed. 1993). The argument that there is no "manslaughter" without the killing of "an individual human" is therefore entirely correct. Likewise, there can be no unfair competition without both unfairness and at least some form of competition, quite contrary to Professor McCarthy's assertion. For more on this argument, see *infra* Part IV.A.

petitive injury, and even circuits that do not apply a categorical test favor competitors.[185] Furthermore, other scholars who agree with McCarthy's criticism of the Ninth Circuit's dichotomous approach suggest that standing should "exclude parties whose commercial interest is de minimus [sic] or exceedingly indirect"[186] and should only include noncompetitors to the extent that they "miss being competitors simply because they are doing business on different economic levels."[187] Thus, most Scholars agree that there must be at least some form of competition for standing to sue for false advertising.

Still, the categorical approach may not allow parties to bring suit even if they compete in a market similar to that of the defendant.[188] For example, under the holding in *Halicki*, a restaurant chain, such as Chili's, may not be able to sue a fast-food chain, such as McDonald's, for false advertising because the restaurants compete in "different" markets, even if McDonald's runs false advertisements that have a negative impact on Chili's. In addition, the categorical approach may prevent these parties from bringing suit even when the defendant's false advertisements directly target the plaintiff.[189] This result runs counter to the broad language for standing in section 43(a), even when the purpose provision in section 45 is taken into account.[190] Still, under the gentler language adopted in subsequent cases that requires only a showing of competitive injury rather than actual competition, these concerns may be somewhat alleviated.[191]

B. Problems Raised by the Quasi-Categorical Approach

Much like other circuits, those applying the quasi-categorical approach have held that standing turns on "whether the plaintiff has a reasonable interest in being protected against false advertising."[192] These courts have identified section 43(a) as a broadly worded statutory provi-

185. *See supra* Part II.A–C; *see also* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1170–71 (11th Cir. 2007) (holding that direct competitors are generally the most proximate class of plaintiffs to bring a suit for false advertising), *cert. denied*, 128 S. Ct. 1647 (2008); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 183 n.10 (3d Cir. 2001) (noting that it is "implicit in the . . . *Conte Bros.* test that a direct competitor will usually have a stronger commercial interest than a noncompetitor").

186. Wrona, *supra* note 2, at 1138.

187. *Id.* (citing 1A LOUIS ALTMAN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 5.04 (4th ed. 1994)).

188. *See, e.g.*, Halicki v. United Artists Commc'ns, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987).

189. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005).

190. "[A]ny person who believes that he or she is or is likely to be damaged . . . ." Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000).

191. *See* Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 734 (9th Cir. 1999). *But see Jack Russell*, 407 F.3d at 1037 (holding that competitive injury means injury that is "harmful to the plaintiff's ability to compete with the defendant").

192. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11 (1st Cir. 1986).

sion with a remedial purpose, compelling broad construction.[193] Consequently, these courts have been quick to conclude that standing is not limited to actual competitors.[194] Instead, courts following this approach look to a commercial or competitive injury, or likelihood of such injury.[195] Still, these courts generally limit standing to commercial parties.[196] Thus, under this approach, standing may not be much different from the categorical approach in application.[197]

While the Second Circuit regards the Lanham Act as "a special and limited unfair competition remedy, [passed] virtually without regard for the interests of consumers,"[198] the First Circuit has favorably quoted language regarding the Act as "a consumer protection statute . . . [passed] to encourage commercial companies to act as . . . 'vicarious avenger[s]' of consumer rights."[199] Despite the disagreement over the statute's underlying purpose, both courts have refused to extend standing much beyond actual competitors—even a plaintiff who alleges that a defendant's false advertising prevents it from entering a particular market is generally denied standing.[200] In fact, these courts "require a more substantial showing where the plaintiff's products are not obviously in competition with [the] defendant's products."[201] Still, these circuits have granted standing to noncompetitors in two significant cases.[202]

In *PPX Enterprises, Inc. v. Audiofidelity, Inc.*, the Second Circuit allowed the plaintiffs (music production companies who owned a royalty interest in Jimi Hendrix recordings but were not promoting or selling those recordings) to bring suit against the defendants (music marketers selling and promoting records that falsely claimed to contain perform-

193. PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120, 124 (2d Cir. 1984).

194. *Id.*; Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971).

195. *See* ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 169 (2d Cir. 2007); Encompass Ins. Co. of Mass. v. Giampa, 522 F. Supp. 2d 300, 310–11 (D. Mass. 2007).

196. W. Indian Sea Island Cotton Ass'n v. Threadtex, Inc., 761 F. Supp. 1041, 1048 (S.D.N.Y. 1991) (citing *Colligan*, 442 F.2d at 692).

197. *See, e.g.*, Crab House of Douglaston, Inc. v. Newsday, Inc., 418 F. Supp. 2d 193, 213 (E.D.N.Y. 2006) (noting that plaintiffs do not have to be direct competitors of the defendant to have standing, but that *competitive* injury is necessary); *Threadtex*, 761 F. Supp. at 1049 (holding that competition between the plaintiff and defendant is necessary, but that the competition may be indirect).

198. *Colligan*, 442 F.2d at 692.

199. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15 (1st Cir. 1986) (quoting Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc., 633 F.2d 746, 753 n.7 (8th Cir. 1980)).

200. *See ITC Ltd.*, 482 F.3d at 170–71 (2d Cir. 2007) (denying standing to an Indian restaurateur attempting to enter the American food market); Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 130–31 (2d Cir. 2000) (denying standing to a Cuban rum producer wishing to sell its product to Americans against an American rum producer falsely designating its product's origin); PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1111–13 (2d Cir. 1997) (denying standing to a patentee of a weight loss drug against a retailer who sold similar products while avoiding FDA approval, allegedly harming the patentee's ability to enter the market).

201. Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 694 (2d Cir. 1994). In *Ortho*, the court required the plaintiff to prove that customers would actually see the defendant's products as replacements for its own products. *Id.* at 695.

202. *See Camel Hair*, 799 F.2d at 12; PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120, 125–26 (2d Cir. 1984).

ances by Jimi Hendrix) despite the fact that the parties were not in competition.[203] The court reasoned that the plaintiffs' pecuniary interest in the sales of legitimate Hendrix records gave them a reasonable interest in the defendants' false marketing of Hendrix recordings because purchasers of the fake Hendrix records would be less likely to purchase other Hendrix records, including legitimate ones, in the future.[204] The court also expressly mentioned that it considered the plaintiffs' royalty interest enough to "make them genuine business competitors" of the defendants.[205]

In *Camel Hair*, the First Circuit allowed a similar claim in which the plaintiff, a trade association of cashmere enthusiasts consisting of manufacturers and vendors of the fabric, brought suit against a clothing manufacturer misrepresenting the cashmere content of its fabrics.[206] The court expressly noted that "none of the five full members [of the trade association] compete[s] with the defendant."[207] Still, the court found that the members' "position as manufacturers and vendors of fabric and clothing containing cashmere [gave] them a strong interest in preserving cashmere's reputation as a high quality fibre [sic]."[208] Thus, courts applying the quasi-categorical approach are more willing to extend standing beyond actual competitors when the plaintiff can show that the defendant's false advertising affects a pecuniary interest.

Had these cases been brought in circuits applying the categorical approach, the plaintiffs would not have been allowed to bring suit. Instead, they almost certainly would have been denied standing as noncompetitors, making it clear that important differences exist between the categorical and quasi-categorical approaches.[209] Still, the quasi-categorical approach retains the clarity and predictability of the categorical approach: cases in the First and Second Circuits tend to hinge on the plaintiff's economic or commercial interest in the alleged false advertising.[210] Furthermore, the quasi-categorical approach may be easier for courts to apply than the categorical approach because it avoids any potential pitfalls in defining specific markets to determine a plaintiff's status as an actual or direct competitor.[211]

203. *PPX*, 746 F.2d at 125–26.
204. *Id.* at 125.
205. *Id.*
206. *Camel Hair*, 799 F.2d at 12.
207. *Id.*
208. *Id.*
209. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1036–37 (9th Cir. 2005) (denying standing when plaintiffs were the direct target of an allegedly false advertisement that caused them financial harm).
210. *See* cases cited *supra* note 195.
211. *See, e.g.*, New.Net, Inc. v. Lavasoft, 356 F. Supp. 2d 1090, 1116 (C.D. Cal. 2004) (holding that plaintiff was not a competitor of defendant because it offered "different products in different segments of the internet market"). For a take on how absurd market definition can potentially become, see Editorial, *Granola and Antitrust*, WALL ST. J., June 19, 2007, at A16 (describing the fight over market definition in the merger between Whole Foods Market, Inc. and Wild Oats Markets, Inc.).

The quasi-categorical approach addresses issues scholars have raised with the harshness of the categorical approach by allowing indirect competitors[212] to bring suit while still excluding parties with tenuous interests.[213] By focusing on the plaintiff's interest and the type of injury alleged, as opposed to the relationship between the parties, the First and Second Circuits have addressed some of the strongest criticisms of the categorical approach.[214]

Still, without a proximity requirement, the quasi-categorical approach has the potential to be the most inclusive of the three tests because noncompetitors may be allowed to sue even if other parties are better suited to bring the claim.[215] Although no conclusive evidence indicates that courts within the First or Second Circuits have been flooded with false advertising claims, this approach may create the potential for a significant impact on the federal court system.[216] Further, adopting an overly inclusive standard may lead to "overenforcement" of section 43(a) and have an overall negative effect on the market, potentially exacerbating some of the very problems that section 43(a) was enacted to solve.[217]

C. The Uncertainty of the Balancing Approach

Courts adopting the balancing approach have recognized that "[n]o single formula is capable of answering every prudential standing question,"[218] and have been quick to reject general prudential standing considerations when determining who may sue under section 43(a).[219] These courts have also flatly rejected the categorical approach to standing, finding that it "enjoys no textual support."[220] While these courts adhere to the same "reasonable interest" language employed by other courts,[221] they have chosen to define that reasonable interest by adopting whole-

212. E.g., parties who are not direct competitors because they compete on "different economic levels." Wrona, *supra* note 2, at 1138.

213. *See, e.g.*, PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1111–13 (2d Cir. 1997) (describing the plaintiff's lack of evidence that his pecuniary interest was harmed or likely to be harmed by the alleged false advertising of the defendant).

214. Lemley, *supra* note 44, at 295 ("[C]ourts should focus on the procompetitive policy aspects of false advertising, which mandate analysis of the injury above the party.").

215. *See, e.g.*, Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11–12 (1st Cir. 1986) (allowing a trade association to sue on behalf of its members); *see also* Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 914 (2d Cir. 1988) (same).

216. As stated by the Third Circuit, "an expansive reading [of section 43(a)] would further flood the already overcrowded federal courts." Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1174 (3d Cir. 1993) (quoting Thorn v. Reliance Van Co., 736 F.2d 929, 932 (3d Cir. 1984)); *see also* Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 235 (3d Cir. 1998).

217. Jordan & Rubin, *supra* note 176, at 551–53; Lemley, *supra* note 44, at 310–13.

218. *Conte Bros.*, 165 F.3d at 225.

219. *Id.* at 226.

220. *Id.* at 233.

221. *Id.* at 230.

sale the Supreme Court's test for standing to sue for an antitrust violation under the Clayton Act.[222]

The first factor of the balancing approach instructs courts to determine whether the alleged injury is of the "type that Congress sought to redress" when it enacted section 43(a).[223] Like the other circuits, courts applying the balancing approach have determined that "the focus of the Lanham Act is on '*commercial* interests [that] have been harmed by a competitor's false advertising,'"[224] and have focused on competitive harms, such as injuries to the plaintiff's goodwill, reputation, or ability to compete.[225] Yet these courts have held that the "loss of sales at the retail level because of alleged false advertising" is not an injury that Congress sought to protect against in enacting section 43(a).[226] This holding lies in stark contrast to the positions of the other circuits, which have held that a likelihood of a loss of sales revenue would constitute a reasonable interest to be protected under section 43(a).[227]

Under the second factor of the balancing test, courts evaluate how directly the conduct of the defendant affected the plaintiff.[228] The directness factor is essentially a straightforward causation analysis and is not substantively different from the causation analyses applied by the other circuits.[229] As such, the second factor prevents commercial entities from suing other commercial entities for any false advertising unless the alleged false advertising directly harms the plaintiff.[230] Thus, at this point in the balancing approach, courts generally ask the same two questions as the courts taking the quasi-categorical approach. But these courts have introduced additional inquiries for standing that drastically change the analysis: the plaintiff's proximity to the alleged conduct,[231] the speculative nature of the damages, the risk of awarding duplicative damages, and the difficulty in apportioning damages among many claimants.[232]

222. *Id.* at 233.

223. *Id.* (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983)).

224. *See, e.g.*, *id.* at 234 (quoting Granite State Ins. Co. v. Aamco Transmissions, Inc., 57 F.3d 316, 321 (3d Cir. 1995)).

225. *Id.*

226. *Id.*

227. *See, e.g.*, ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 171 (2d Cir. 2007) (indicating that a demonstration of lost sales or likelihood of lost sales would establish sufficient injury for standing).

228. Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 181 (3d Cir. 2001); *see* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1169 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).

229. *Compare Phoenix*, 489 F.3d at 1169 (evaluating the causal link between the alleged false advertising and the plaintiff's loss in sales), *with ITC*, 482 F.3d at 170–71 (discussing scenarios that would establish causation).

230. Lemley, *supra* note 44, at 303.

231. *Conte Bros.*, 165 F.3d at 233. This requirement is analogous to the general prudential consideration "that courts 'refrain from adjudicating abstract questions of public significance which amount to generalized grievances.'" *Id.* at 226 (quoting Wheeler v. Travelers Ins. Co., 22 F.3d 534, 538 (3d. Cir. 1994)).

232. *Id.* at 233.

The third factor, the proximity of the plaintiff to the alleged false advertising, requires courts to determine whether the plaintiff is part of a class of persons "whose self-interest would normally motivate them to vindicate the public interest."[233] While linked to the second factor,[234] this factor functions to significantly limit the potential number of claimants who could have standing to sue for the same conduct.[235] In application, the presence of any commercial entity better suited or more likely to bring the claim at hand can preclude standing and essentially limit standing to direct competitors.[236] The proximity requirement thus acts as a safeguard to prevent "overenforcement" of section 43(a).

The fourth factor in the balancing approach concerns the speculative nature of the plaintiff's claim of damages.[237] Much like the requirement in factor (2), the inquiry into the speculative nature of the damages is a question of causation.[238] In fact, almost every court using the balancing test finds that the "directness" analysis of factor (2) and the speculative damages inquiry of factor (4) weigh in the same direction and for the same reasons.[239] To illustrate, the court in *Joint Stock Society* found that the injury was indirect because the plaintiff, a Russian vodka producer, did not actually import or attempt to import its product into the United States. The defendant's alleged false advertising within the United States thus could not have directly affected the plaintiff's sales.[240] Likewise, the court found that the damages were highly speculative "[b]ecause the plaintiffs have never sold or attempted to sell their vodka

233. *Id.* at 234 (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542 (1983)).

234. *See* Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, 332 n.1 (5th Cir. 2002); Lemley, *supra* note 44, at 303.

235. *See Phoenix*, 489 F.3d at 1170–71; *Conte Bros.*, 165 F.3d at 234–35.

236. Lemley, *supra* note 44, at 303–04; *see Phoenix*, 489 F.3d at 1170 (finding no class of plaintiffs more proximate to the injurious conduct when the plaintiff was a direct competitor of the defendant); *Conte Bros.*, 165 F.3d at 234–35 (finding plaintiff remote from the alleged misconduct because of the presence of another class of potential plaintiffs closer to the injury—other manufacturers of products that compete directly with the defendant).

237. *Conte Bros.*, 165 F.3d at 233.

238. *See Phoenix*, 489 F.3d at 1171–72 (holding that an attenuated connection between the alleged false advertising and the alleged injury weighed against standing); *Ford*, 301 F.3d at 332 n.1; *Conte Bros.*, 165 F.3d at 235 (holding that the claimed damages were speculative because they could have been avoided if the plaintiff retailer had stocked the defendant manufacturer's product); Lemley, *supra* note 44, at 304 (describing the fourth factor as asking "(1) if the damages are speculative, and (2) if they are avoidable").

239. *See Phoenix*, 489 F.3d at 1169–72 (finding indirect injury and speculative damages because it would be impossible to attribute a specific portion of the injury to the alleged false advertising); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 183 n.10 (3d Cir. 2001) (finding indirect injury and speculative damages because the plaintiff did not market its product in the United States); *see also* Alexander Mill Servs., LLC v. Bearing Distribs., Inc., No. 2:06-cv-1116, slip op. at 6–7 (W.D. Pa. Sept. 28, 2007) (finding speculative damages and indirectness because the plaintiff had not competed in the market in question); Cook Drilling Corp. v. Halco Am., Inc., No. CIV.A. 01-2940, 2002 WL 84532, at *10 (E.D. Pa. Jan. 22, 2002) (finding that the speculative damages factor and the directness factor weigh in favor of standing, but finding the directness factor weak).

240. *Joint Stock Soc'y*, 266 F.3d at 182.

in the United States."[241] Essentially, the fourth factor compels courts to weigh causation at least twice in any balance.

The fifth factor weighing in the balance is "[t]he risk of duplicative damages or complexity in apportioning damages."[242] This factor functions to weigh against standing when the plaintiff participates in a market in which there are many competitors.[243] This factor also allows courts to oppose standing when there is a fear that allowing standing would adversely impact the federal courts by encouraging a flood of claims.[244] In this way, the fifth factor repeats the inquiry conducted in the second and third factors, compelling courts to evaluate the "directness" of the effect on the plaintiff and the effects of standing on the federal courts.[245] Thus, at this point in the analysis, courts have conducted only three separate inquiries, at most.

While evaluating the fifth factor, the court in *Conte Bros.* interestingly cited *Erie*, referencing section 43(a)'s beginnings as a replacement for the federal common law on unfair competition.[246] In doing so, the court insinuated that standing under section 43(a) should be similar to standing under common law unfair competition claims.[247] Yet standing to sue for false advertising under the common law cause of action was incredibly narrow[248] and contrary to the broad language for standing Congress used in section 43(a).[249] Simply because section 43(a) was drafted in part to replace the federal unfair competition common law after it was eliminated in *Erie* does not mean that standing should be limited as it was at common law.[250] In fact, this contention has been repeatedly rejected: the modern view since the landmark case of *L'Aiglon Apparel v. Lana Lobell, Inc.*[251] has been that section 43(a) represents a considerable departure from the common law.[252]

241. *Id.* at 183.

242. *Conte Bros.*, 165 F.3d at 233.

243. *See Phoenix*, 489 F.3d at 1172 (holding that the fifth factor weighed against standing because allowing the plaintiff to sue would allow every competitor of the defendant to bring a false advertising claim); Procter & Gamble Co. v. Amway Corp., 242 F.3d 539, 564 (5th Cir. 2001) (same); *Conte Bros.*, 165 F.3d at 235 (holding that the fifth factor weighed against standing because, otherwise, every party in the supply chain could sue).

244. *See Phoenix*, 489 F.3d at 1172 (evaluating the impact standing would have on the federal courts); *Conte Bros.*, 165 F.3d at 235 (same).

245. Lemley, *supra* note 44, at 305.

246. *Conte Bros.*, 165 F.3d at 235; *see* Lemley, *supra* note 44, at 305.

247. *See* Lemley, *supra* note 44, at 305 (arguing that the influx of cases would defeat Congress's purpose in enacting section 43(a) to resurrect the federal unfair competition common law); *see also* Thomas L. Casagrande, *Recent Developments in Trademark Law*, 7 TEX. INTELL. PROP. L.J. 463, 489 (1999) (criticizing the court's holding as "overbroad" and "speculative").

248. *See supra* note 12 and accompanying text.

249. *See supra* note 13 and accompanying text.

250. *See* McCarthy, *supra* note 9, at 55–56.

251. 214 F.2d 649 (3d Cir. 1954).

252. *See* McCarthy, *supra* note 9, at 56.

The balancing approach enjoys the support of major commentators,[253] and has been touted by scholars as "strik[ing] the appropriate balance between securing accurate information in the market and prohibiting anticompetitive conduct through overenforcement of section 43(a)."[254] But the factors in this balancing test have also been criticized as "nebulous" and "difficult" to interpret.[255] The deep underlying problems with the balancing test are well demonstrated by the Eleventh Circuit's recent decision in *Phoenix*.

In *Phoenix*, the court found that both factors (1) and (3) favored standing.[256] At factor (1), the court found that the plaintiff, a Burger King franchisee, alleged a commercial harm in its decrease in sales and increased expenses in counteradvertising.[257] This finding comports with the broad language of section 43(a) and with other courts' interpretations of the reach of section 43(a).[258] At factor (3), the court found that no other commercial party was more proximate to the injury than the plaintiff because it alleged a loss of sales and market share resulting from the false advertising by McDonald's, its direct competitor.[259] This factor is unique to the balancing approach, but it properly addresses the concern that section 43(a) may be "overenforced" by limiting standing to only those parties who have the strongest interest in the matter at hand.[260] Both factors thus weigh rather straightforwardly in favor of standing and address the competing policy concerns of preventing "overenforcement" of section 43(a) and following congressional intent.[261]

As to factors (2), (4), and (5), the court found that none favored standing.[262] At factor (2), the court found causation to be attenuated be-

253. Most notably Professor McCarthy and the *Restatement*. *See supra* note 133 and accompanying text; *see also* Lemley, *supra* note 44, at 314 ("Courts should adopt the . . . test . . . articulated by the Third Circuit in *Conte Bros.* and refined in *Joint Stock*.").

254. Lemley, *supra* note 44, at 310.

255. Kent, *supra* note 90, at 4.

256. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1173 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).

257. *Id.* at 1168. The Eleventh Circuit's analysis mirrored that of the district court, but the lower court held that the first factor favored standing "only weakly" because the advertisements did not mention the products of either McDonald's or any of its competitors and instead concentrated on the chances of winning certain prizes. Phoenix of Broward, Inc. v. McDonald's Corp., 441 F. Supp. 2d 1241, 1250 (N.D. Ga. 2006), *aff'd*, 489 F.3d 1156, *cert. denied*, 128 S. Ct. 1647.

258. *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000); ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 169 (2d Cir. 2007) (holding that the focus of the Lanham Act is on commercial or competitive injuries).

259. *Phoenix*, 489 F.3d at 1171. The district court held that the third factor weighed against standing because McDonald's customers were more proximate to the injury than Burger King. *Phoenix*, 441 F. Supp. 2d at 1251. As the Eleventh Circuit noted, however, if customers were taken into account, the third factor would never favor standing. *Phoenix*, 489 F.3d at 1170.

260. *See* Lemley, *supra* note 44, at 310. It follows that, if the party closest to and most affected by the injurious conduct does not come forward to complain of it, then no other party should be able to bring that claim. This is analogous to the general prudential standing requirement that a party must assert her own rights as opposed to those of a third party. *See supra* note 38 and accompanying text.

261. WEINSTEIN & KAPLAN, *supra* note 4, at 3.

262. *Phoenix*, 489 F.3d at 1169–73.

cause, due to the large number of competitors in the market, Burger King could not prove that McDonald's customers would have eaten at Burger King but for the false advertising,[263] nor could it show that its customers were drawn away by the minute opportunity to win the certain high-value prizes that were falsely advertised as available.[264] But it is questionable whether difficulties in proving causation should defeat standing when the injury can be fairly traced back to the actions of the defendant.[265] In fact, the district court held that the second factor favored standing because the plaintiff alleged that it was injured as a direct result of the false advertising that drew customers away from Burger King and to McDonald's.[266] Further, when "there are numerous sources [of a particular product] in an open market, it [is] impossible to ascertain whether consumers would have dealt with a particular seller but for the defendant's deceptive advertising."[267] Thus, a strict causation requirement at factor (2) results in an inquiry similar to the outdated and long-since-rejected common law "single source" rule.[268]

Likewise, at factor (4), the court found that the alleged damages were speculative because the plaintiff could not prove that Burger King's lost sales and McDonald's increased sales during the period of the false advertising were attributable to that advertising.[269] To support this contention, the court again noted that customers still had an equal opportunity to win many of the advertised prizes and that "the fast food market consists of *many* competitors, only two of which are McDonald's and Burger King."[270] Thus, the court essentially restated its analysis at factor (2)—an especially troubling fact considering the questionable nature of the court's analysis at factor (2).

At factor (5), the court found that the risk of duplicative damages and the complexity in apportioning damages were both high.[271] The court evaluated the fifth factor by "examining the number of potential claimants in the same position in the distribution chain as the plaintiff and . . . in the same market as the plaintiff."[272] The court reached its conclusion by, yet again, noting the large number of competitors in the fast-food market and finding that, if the plaintiff were allowed standing, every competitor in the fast-food market could also sue.[273] The court went on

263. *Id.* at 1169 (skeptically noting the plaintiff's allegation that "McDonald's lured customers who would have eaten at *Burger King* (as opposed to one of numerous other fast food competitors), causing Burger King to lose sales").

264. *Id.*

265. *See* Price, *supra* note 5, at 1361–62; *see also supra* note 31.

266. Phoenix of Broward, Inc. v. McDonald's Corp., 441 F. Supp. 2d 1241, 1245 (N.D. Ga. 2006), *aff'd*, 489 F.3d 1156 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).

267. McCarthy, *supra* note 9, at 55.

268. *See id.*; *supra* note 252 and accompanying text.

269. *Phoenix*, 489 F.3d at 1171.

270. *Id.*

271. *Id.* at 1172.

272. *Id.*

273. *Id.*

to argue that allowing standing in this case could have a large impact on the federal courts because of the influx of cases that could result.[274] Thus, at factor (5), the court actually evaluated the impact that standing would have on the federal courts rather than the effect it would have on the defendant.

The court's line of reasoning, particularly at factors (2) and (5), would prevent any party from having standing to sue another party for false advertising whenever those parties compete in a large market or whenever the defendant's false advertisements affect a large number of similarly situated parties.[275] For example, had McDonald's falsely advertised the health aspects of some of its food without referencing the products of any of its competitors, none of its competitors could bring suit for false advertising.[276] Although factors (1) and (3) would likely weigh in favor of standing in this scenario, factors (2), (4), and (5) would weigh against standing—just as they did in *Phoenix*.

Factors (2) and (4) would weigh against standing because no competitor would be able to prove that McDonald's customers would have eaten at *its* establishment, as opposed to one of its many competitors, nor could any competitor prove that customers were drawn to McDonald's due to the falsely advertised food (as opposed to the truthfully advertised food), making causation tenuous and damages speculative.[277] Factor (5) would also weigh against standing because the large number of competitors in the market would make it difficult to apportion damages between the injured parties and would create a large risk of duplicative damages.[278] Therefore, as long as a party in a large market falsely advertises in a way that affects its competitors equally,[279] it will be in a position in which no party will have standing to bring suit against it.

The court in *Conte Bros.* praised the balancing test as "provid[ing] appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under both prongs of section

274. *Id.*

275. *See* McCarthy, *supra* note 9, at 55; WEINSTEIN & KAPLAN, *supra* note 4, at 4.

276. *See* WEINSTEIN & KAPLAN, *supra* note 4, at 4.

277. The court in *Phoenix* indicated that its analysis may have been different at factor (2) had McDonald's made false statements about its products rather than its prizes. *See Phoenix*, 489 F.3d at 1169. Still, the nature of the advertisements was not directly analyzed in factor (2): the court reached its result by suggesting that the additional customers McDonald's drew in did not necessarily come from Burger King and that the advertisements were false as to only some of the prizes. *Id.* By their nature, advertisements and similar promotions are designed to draw customers to a particular product and away from that product's competition. Reaching a different conclusion based on the subject matter of the advertisements makes little sense if the effects of the advertisements are the same. Thus, no distinction should be drawn between advertisements falsely representing a customer's chances of winning certain prizes and advertisements falsely representing the health aspects of certain menu items. Either way, the plaintiff would be alleging the same basic causal chain.

278. This analysis would be essentially identical to the analysis in *Phoenix*. *See id.* at 1172–73.

279. By falsely advertising about its own products, rather than about the products of its competitors, for example.

43(a)."[280] But by adopting a balancing test, courts lose the simple application and predictable results of the bright-line standards.[281] Also, the factors of the balancing test are ripe with overlap and repetition.[282] As with many other multifactor tests, this test "manages to be at once redundant, incomplete, and unclear," as demonstrated above.[283] The balancing approach will thus lead to more confusion among district courts and potential litigants, causing inconsistent results and higher potential for overturned decisions.[284]

The *Restatement (Third) of Unfair Competition* supports the balancing approach by suggesting that the original balancing test, as applied to federal antitrust law in *Associated General Contractors*, "may offer a useful analogy" when courts attempt to determine whether an alleged injury is direct enough to confer standing under section 43(a).[285] Yet only factor (2) of the balancing test actually focuses on the directness of the injury; the other factors are useless for this purpose.[286] Similarly, McCarthy expressed his opinion that "some limit on the section 43(a) standing of persons remote from the directly impacted party should be applied by analogy" to the *Associated General Contractors* balancing test.[287] Again, only a single factor from the balancing approach would be helpful for this purpose: factor (3).[288] Interestingly, both McCarthy and the *Restatement* focus on limiting standing under section 43(a) to the parties most affected by the alleged false advertising.[289] Thus, commentators do not necessarily support a wholesale adoption of the balancing test, but rather suggest a limited adoption of select factors—namely, factors (2) and (3).

Even though courts taking the balancing approach criticize the limitations of the categorical test, the balancing test has the effect of limiting

280. Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 236 (3d Cir. 1998).

281. *Compare Phoenix*, 489 F.3d at 1167–73 (denying standing based on the five-factor balancing test), *with* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005) (denying standing because the plaintiff was not a competitor of the defendant), *and* Telecom Int'l Am., Ltd. v. AT & T Corp., 280 F.3d 175, 197 (2d Cir. 2001) (same).

282. *See* Kent, *supra* note 90.

283. Palmer v. City of Chi., 806 F.2d 1316, 1318 (7th Cir. 1986); *see also* Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 834–35 (7th Cir. 1999).

284. It has been suggested that the balancing approach will encourage district courts to use summary judgment as a tool to dispose of cases in which there is clearly no prudential standing, lowering the risk of having a trial overturned for lack of prudential standing after the fact. Lemley, *supra* note 44, at 316. Yet this would be the result if any uniform standard were adopted. *See id.* at 315.

285. RESTATEMENT, *supra* note 133, § 3 cmt. f.

286. Factor (1) focuses solely on the nature of the injury, factor (3) focuses on the existence of other injured parties, and factors (4) and (5) focus on damages. Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 233 (3d Cir. 1998). Factors (1), (3), and (5) are simply separate inquiries that do not apply to directness at all, and factor (4) merely repeats the analysis of factor (2). *See supra* notes 269–70 and accompanying text.

287. 5 MCCARTHY, *supra* note 7, § 27:32 n.1.

288. *See supra* note 286. Factor (2) may be somewhat useful in determining which parties are the most directly affected by the injurious conduct. Still, factor (3) is the only factor dealing directly with remoteness. *See Conte Bros.*, 165 F.3d at 233.

289. *See* 5 MCCARTHY, *supra* note 7, § 27:32 n.1; RESTATEMENT, *supra* note 133, § 3 cmt. f.

standing mostly to direct competitors.[290] In fact, very few examples of noncompetitor standing exist in circuits applying the balancing test, and those examples involve false advertisements directed at the plaintiff's product.[291] Additionally, as demonstrated by the *Phoenix* case, the balancing test can actually limit standing *beyond* direct competitors in a saturated market, seeming to defeat Congress's purpose in adopting broad language for standing.[292] Further, including factors on damages in the analysis, such as factors (4) and (5), is nonsensical in actions for injunctive relief.[293] Nor does it make sense to have separate standards for actions based on the type of relief sought: "[T]he notion that a party could have standing to sue for injunctive relief but not for damages under the Lanham Act runs afoul of the statutory language and more than a half-century of Lanham Act jurisprudence."[294]

The balancing test ultimately fails to fulfill the promise that it will cure the ills of Lanham Act jurisprudence. Instead, under the balancing test, "equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; [and] judicial courage is impaired."[295] Therefore, although the balancing approach does address certain policy concerns, in application it raises more issues than it resolves.[296]

IV. Resolution and Recommendation

As discussed above, each approach has its flaws: the categorical approach is too narrow,[297] the quasi-categorical approach is too broad,[298] and the balancing approach is unavailing.[299] Still, each test provides guidance in developing a new, optimal standard that avoids vague balancing and establishes a workable rule of law.[300] To address the concerns and criticisms of the current approaches to standing under section 43(a), courts should adopt a three-prong bright-line standard under which a plaintiff must show: (1) the injury is of the type contemplated by Congress when it enacted section 43(a) (i.e., it is commercial or competitive

290. *See* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 183 (3d Cir. 2001); *Conte Bros.*, 165 F.3d at 234–35; Pernod Ricard USA LLC v. Bacardi U.S.A., Inc., 505 F. Supp. 2d 245, 253–54 (D. Del. 2007); Smith v. Lucent Techs., Inc., No. Civ.A. 02-0481, 2004 WL 515769, at *27–28 (E.D. La. Mar. 16, 2004).

291. *See* Logan v. Burgers Ozark Country Cured Hams Inc., 263 F.3d 447, 461 (5th Cir. 2001); Wellness Publ'g v. Barefoot, No. 02-3773 (JAP), slip op. at 13 (D.N.J. Jan. 9, 2008).

292. *See also* MCW, Inc. v. Badbusinessbureau.com, L.L.C., No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *12–15 (N.D. Tex. Apr. 19, 2004).

293. WEINSTEIN & KAPLAN, *supra* note 4, at 4.

294. *Id.*

295. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

296. Ironically, this standard seems to be the most challenging for plaintiffs to meet even though it was adopted out of criticism of the categorical standard's limitations.

297. *See supra* Part III.A.

298. *See supra* Part III.B.

299. *See supra* Part III.C.

300. *See generally* Scalia, *supra* note 295, at 1187.

in nature);[301] (2) there is a causal link between the injuries and the alleged false advertising;[302] and (3) no other party is better suited to bring the action.[303] By utilizing this three-prong test, courts will achieve clear, predictable results without "overenforcing" section 43(a) or unreasonably narrowing its reach.[304]

By adopting the standard proposed by this Note, courts will reduce uncertainty over who may sue under the Act. The increased certainty in standing will facilitate the settlement process and allow parties to determine their own outcomes, reducing the burden on the courts.[305] Further, this new test will allow section 43(a) to function as a deterrent against false advertising regardless of the presence of a large number of competitors in any given market. At the same time, this test will focus the inquiry on where the injury is felt to allow standing in factually disparate situations.[306] Ultimately, this test aligns the incentives and ability to sue with the public interest.

This Section describes how the bright-line test proposed by this Note retains the strengths of each of the current approaches while avoiding the pitfalls that have doomed them. To demonstrate its superiority, the approach proposed by this Note is tested against the criticisms of the three current approaches. Each factor is analyzed separately in numerical order.

A. Factor (1): Commercial or Competitive Injury

As discussed above, the first factor in the new approach proposed by this Note requires the plaintiff to show that the injury is of the type contemplated by Congress when it enacted section 43(a).[307] Even though courts may differ in their determinations of the purpose of section 43(a), courts generally agree that the focus of the section is commercial interests.[308] In fact, courts applying both the quasi-categorical approach and

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301. This factor is adopted from the general agreement that section 43(a)'s focus is on commercial interests. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005); Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 234–35 (3d Cir. 1998); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971).

302. This factor is adopted by analogy to the Article III causation requirement. *See supra* note 31. Also, a prudential causation requirement is common to all three approaches. *See* ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 170 (2d Cir. 2007); *Conte Bros.*, 165 F.3d at 233; *supra* note 164 and accompanying text.

303. This factor is adopted exclusively from the balancing test. *See Conte Bros.*, 165 F.3d at 233.

304. Clarity and predictability may be seen as valid ends in and of themselves. *See* Scalia, *supra* note 295, at 1179.

305. *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 51 (1996).

306. For example, focusing on where the injury is felt rather than whether the parties are in competition would allow standing when the allegedly false advertisements focus on a particular party even if that party is a noncommercial entity, such as a nonprofit organization.

307. *See supra* note 301 and accompanying text.

308. *Id.*

the balancing approach view section 43(a) as protecting commercial interests broadly and not solely protecting competitive interests.[309]

Limiting standing to direct competitors avoids the potential for "overenforcement" of section 43(a)[310] and provides for consistent, predictable results.[311] But such a limit necessitates different approaches to standing for false endorsement under section 43(a)(1)(A) and false advertising under section 43(a)(1)(B) because "the purported endorser who is commercially damaged by the false endorsement will rarely if ever be a competitor."[312] Taking separate approaches to standing under section 43(a)(1)(A) and section 43(a)(1)(B) makes little sense and unnecessarily complicates the standing analysis, resulting in more confusion and unnecessary litigation.[313] Thus, standing under section 43(a) cannot be limited to direct competitors *per se*.

Placing the focus of the standing analysis on general commercial interests consistently applies the broad language of section 43(a).[314] The statute clearly states that "any person who believes that he or she is or is likely to be damaged" may bring suit for false advertising.[315] This language strongly implies that courts should adopt an inclusive standard.[316] Even though the parties most likely to be damaged will be direct competitors,[317] there are circumstances in which it is appropriate for noncompetitors to bring suit.[318] Thus, it makes sense for the initial inquiry in the standing analysis to focus on the commercial nature of the injury, leaving open the possibility for noncompetitor standing.

Also, the first factor of the approach advocated by this Note places the focus of the standing analysis on the nature of the alleged injury rather than the relationship between the parties. This shift in focus may make little difference in many cases due to the fact that a party injured by false advertising will often be a direct competitor of the false adver-

309. *Compare* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 180 (3d Cir. 2001) ("Section 43(a) is intended to provide 'a private remedy to a commercial plaintiff who meets the burden of proving that its commercial interests have been harmed by a competitor's false advertising.'" (quoting Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1175 (3d Cir. 1993))), *and* Havana Club Holding, S.A. v. Galleon S.A., 203 F.3d 116, 130 (2d Cir. 2000) ("'Although a section 43 plaintiff need not be a direct competitor, it is apparent that, at a minimum, standing to bring a section 43 claim requires the potential for a commercial or competitive injury.'" (quoting Berni v. Int'l Gourmet Rests. of Am., Inc., 838 F.2d 642, 648 (2d Cir. 1988))), *with* Halicki v. United Artists Commc'ns, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987) ("The statute is directed against unfair competition. To be actionable, conduct must not only be unfair but must in some discernable way be competitive.").

310. *See supra* note 179 and accompanying text.

311. *See supra* notes 172–74 and accompanying text.

312. Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1107 (9th Cir. 1992).

313. Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 232–33 (3d Cir. 1998); Wrona, *supra* note 2, at 1136–38; *see, e.g.*, Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005).

314. *Conte Bros.*, 165 F.3d at 232–33.

315. Lanham Act § 43(a), 15 U.S.C. § 1125(a) (2000).

316. *See* McCarthy, *supra* note 9, at 57.

317. *See supra* notes 175–77 and accompanying text.

318. *Conte Bros.*, 165 F.3d at 234; 5 MCCARTHY, *supra* note 7, § 27:32; *see, e.g.*, Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6 (1st Cir. 1986).

tiser.[319] Still, scholars suggest that the "procompetitive policy aspects of false advertising . . . mandate analysis of the injury above the party."[320] This suggestion makes sense because the injury in a false advertising case may easily impact parties other than direct competitors.[321] Thus, rather than focusing solely on whether the parties to the action are in competition, the new approach directs courts to look to where the injury is felt and to "what type[s] of injury may confer standing."[322]

Courts applying the categorical approach argue that allowing noncompetitors to have standing will dilute section 43(a).[323] Also, other courts have expressed concern that extending standing may have a significant impact on the federal courts.[324] Both of these concerns are valid, and neither is addressed under the first factor of the new approach. Instead, both of these concerns are addressed by the third factor: whether the plaintiff is the best-suited party to bring the claim.[325]

Therefore, the first factor of the new bright-line test proposed by this Note offers a superior approach to standing under section 43(a) than the categorical approach because it applies equally to both section 43(a)(1)(A) and section 43(a)(1)(B), it consistently follows the broad statutory language adopted by Congress, and it places the focus on the alleged injury rather than the parties.

B. Factor (2): Causation

The second factor of the standard introduced by this Note requires a showing of causation. A causation requirement is common to all three current approaches.[326] Causation is also a particularly strong part of the analysis under the balancing approach, as it is raised in at least three of its five factors.[327] Still, it is the repetition and not the presence of a causation inquiry that presents serious problems.[328] In fact, including a causation requirement in the standing analysis under section 43(a) can be very helpful in providing courts much-needed flexibility.

As mentioned above, causation is one of the three requirements for Article III standing.[329] Under the Article III causation requirement, the plaintiff is required to show that the "injury . . . fairly can be traced to the challenged action of the defendant," but is not required to prove that the

319. *See supra* notes 175–77 and accompanying text.
320. Lemley, *supra* note 44, at 295.
321. *See, e.g.*, Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1037 (9th Cir. 2005); PPX Enters., Inc. v. Audiofidelity, Inc., 746 F.2d 120, 125–26 (2d Cir. 1984).
322. Lemley, *supra* note 44, at 295.
323. *See supra* note 166 and accompanying text.
324. *See supra* note 216 and accompanying text.
325. *See infra* Part IV.C.
326. *See supra* notes 122, 164, 229 and accompanying text.
327. Ford v. NYLCare Health Plans of the Gulf Coast, Inc., 301 F.3d 329, 332 n.1 (5th Cir. 2002).
328. *See supra* Part III.C.
329. *See supra* note 31 and accompanying text.

defendant's actions, in fact, caused the injury.[330] The implied causation requirement of the categorical approach mirrors the Article III causation requirement.[331] Also, the causation requirement in the quasi-categorical approach requires only that the plaintiff show either "a link or 'nexus' between itself and the alleged falsehood"[332] or a "reasonable belief" that it is likely to be harmed.[333] Likewise, the causation requirement of the balancing approach is substantially similar to the requirement of Article III and the requirements of the categorical and quasi-categorical approaches.[334]

Although there is little controversy over the causation requirement of any of the approaches, this requirement may be wholly unnecessary because of the overlap with Article III. As a matter of course, if a plaintiff fails the causation requirement for Article III standing, that plaintiff should also fail the causation requirement for prudential standing and should not be able to bring suit.[335] Often, the inverse is also true.[336]

Yet the Eleventh Circuit determined in *Phoenix* that the plaintiff met the causation requirement of Article III but failed the causation requirement of the balancing test.[337] Regrettably, the court did not explain the difference in its approach to causation under the constitutional and prudential standing analyses. Still, the court stated that it found causation tenuous, and weighed the balance accordingly.[338] Fortunately, the court explicitly limited its holding to the specific facts of the case, sweeping its vague causation analysis under the rug.[339]

More often than not, the causation analysis in any prudential standing inquiry merely repeats the causation analysis under Article III. At the same time, as shown in *Phoenix*, the causation requirement can potentially provide courts additional discretion and flexibility in their decisions to grant or deny standing.[340] Even though the *Phoenix* court did

330. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976).

331. *See* Hutchinson v. Pfeil, 211 F.3d 515, 521–22 (10th Cir. 2000).

332. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11–12 (1st Cir. 1986).

333. Ortho Pharm. Corp. v. Cosprophar, Inc., 32 F.3d 690, 694 (2d Cir. 1994) (quoting Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 316 (2d Cir. 1982)).

334. *Compare* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 177–78 (3d Cir. 2001) (arguing that the causal requirement of Article III is not met because of the lack of a connection between the plaintiff's complained of injuries and the defendant's false advertising), *with id.* at 181–82 (arguing that factor (2) of the balancing test is not satisfied for essentially the same reason). *But see* Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1161–62, 1169–70 (11th Cir. 2007) (holding that the plaintiff met the causation requirement of Article III, but failed the causation requirement of the balancing test), *cert. denied*, 128 S. Ct. 1647 (2008).

335. *See, e.g.*, *Joint Stock*, 266 F.3d at 177–82.

336. *See, e.g.*, Pernod Ricard USA LLC v. Bacardi U.S.A., Inc., 505 F. Supp. 2d 245, 251–54 (D. Del. 2007).

337. *Phoenix*, 489 F.3d at 1161–62, 1169–70.

338. *See id.* at 1169–70.

339. *See id.* at 1173.

340. *See id.*; *see also* Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 236 (3d Cir. 1998) (explaining the need for an approach to standing that provides the flexibility to "address factually disparate scenarios" but also supplies "a principled means for addressing standing").

not adequately explain its reasoning, it makes sense to have a more stringent causation requirement at the prudential level. Otherwise, there should be no causation requirement at the prudential level at all.

The adoption of a stricter causation requirement in the prudential standing analysis should not drastically alter the current trend of prudential and Article III causation analyses having similar results. Instead, the prudential causation inquiry should defeat standing only when the plaintiff alleges a particularly tenuous causal chain. Thus, when considering prudential standing, courts should not ask whether the alleged injuries can be fairly traced to the actions of the defendant, but rather, whether "the defendant's conduct has had a direct effect on either the plaintiffs or the market in which they participate."[341] As stated by the Supreme Court in its recent decision *Dura Pharmaceuticals, Inc. v. Broudo*, "[t]o 'touch upon' a loss is not to *cause* a loss."[342] Likewise, to falsely advertise does not necessarily injure every competitor in the marketplace. Thus, a plaintiff should not be able to satisfy the causation requirement solely by showing that it lost sales contemporaneously with the defendant's engaging in false advertising. Instead, a plaintiff must allege a direct connection between the alleged injury and the defendant's false advertising.

Therefore, the causation requirement at factor (2) of the bright-line standard proposed by this Note eliminates the repetition of Article III causation analysis at the prudential level. Additionally, this causation requirement defeats the assumption that a party is harmed whenever there is false advertising in the marketplace.

C. Factor (3): Proximity

The third factor of the approach advocated by this Note directs courts to determine whether the plaintiff is the best-suited party to bring the claim at bar. At this point in the analysis, courts must ask whether there is "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in [false advertising] enforcement," and whether that class includes the plaintiff.[343] By extending standing beyond direct competitors at the first factor but including a proximity requirement at the third factor, the new bright-line approach is both inclusive and principled, striking an optimal balance between the current approaches.[344]

Even though the categorical approach effectively prevents excessive litigation under the Lanham Act, it deprives courts of much-needed discretion.[345] Conversely, the quasi-categorical approach provides courts

341. Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 181 (3d Cir. 2001).

342. 544 U.S. 336, 343 (2005).

343. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 542 (1983).

344. Lemley, *supra* note 44, at 303–04.

345. *See Conte Bros.*, 165 F.3d at 232–33, 236.

with discretion, but is too inclusive and may have the effect of increasing market inequalities.[346] The proximity requirement thus presents a compromise between these two approaches while maintaining the clarity and predictability of both approaches and allowing courts to balance the competing policy concerns of expanding standing beyond direct competitors and preventing "overenforcement" of section 43(a).[347]

Although the balancing test also includes a proximity requirement, the new bright-line test advocated by this Note is more consistent with the recommendation that the balancing test from *Associated General Contractors* be used as an *analogy* for standing under the Lanham Act.[348] Rather than adopting wholesale a standard that does not quite fit, courts should determine which factors of the balancing test are relevant to false advertising claims. As a general rule in false advertising cases, damages are difficult to prove and the "chief remedy" provided is injunctive relief.[349] Thus, it makes little sense to apply factors (4) and (5) of the balancing test to section 43(a) claims.[350] The bright-line test addresses this problem by implementing the valuable proximity requirement while leaving behind the questionable factors.

The proximity requirement is a necessary inclusion to the standing analysis proposed by this Note because it allows courts to protect themselves from being flooded by section 43(a) claims and prevents the dilution of the statute. Courts applying the new standard may determine whether the particular claim would be better brought by a different party and grant or deny standing on those grounds.[351] The ability of courts to deny standing based on proximity allows them to guard against market inequalities by preventing "overenforcement" and provides them with ample discretion to make that determination.[352] Thus, the new bright-line test preserves the balancing approach's strengths by adopting its proximity requirement, allowing for a potentially broad class of plaintiffs, without running the risk of overburdening the courts.

Therefore, the proximity requirement at the third factor of the new approach advocated by this Note presents an optimal approach to standing under section 43(a) because it retains the highly praised elements of the balancing test while incorporating the clarity and predictability of the other approaches.

346. *See* Lemley, *supra* note 44, at 310–13.

347. *Id.* at 310.

348. *Conte Bros.*, 165 F.3d at 233 (citing 5 MCCARTHY, *supra* note 7, § 27:32 n.1; RESTATEMENT *supra* note 133, § 3 cmt. f).

349. Lemley, *supra* note 44, at 313.

350. *See supra* note 293 and accompanying text.

351. *Cf.* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 182–83 (3d Cir. 2001).

352. *Cf. id.*

D. The New Approach in Application

As discussed above, the new test advocated by this Note is easy to apply and will lead to consistent, predictable results, reducing the burden on the federal court system by allowing lower courts to more reliably use summary judgment to dispose of cases.[353] What's more, the new standard is flexible and applies logically to both prongs of section 43(a). Finally, the proposed bright-line standard aligns standing analysis for false advertising with the public interest in promoting both market efficiency and the dissemination of truthful information into the marketplace.

To demonstrate each of these claims, the proposed approach is first applied to the facts of several prominent false advertising cases. Next, the new approach is applied to the facts of a prominent false endorsement case to show its versatility. Then, the effects that the bright-line standard would have on the market are briefly discussed to detail the nuances of this approach. Finally, the new approach is applied to the facts of *Phoenix*, illustrating a unique twist in the proposed standard.

1. The New Approach as Applied to False Advertising Cases Brought Under Section 43(a)(1)(B)

In all likelihood, many false advertising cases decided under the balancing approach, such as *Conte Bros.* and *Joint Stock Society*, would come to the same result under the new standard.[354] Yet if the new test were applied to the facts of cases such as *Jack Russell* or *Camel Hair*, the results could differ greatly.

Under this new standard, the plaintiff in *Joint Stock Society* would still have been prevented from bringing suit because it would have failed to satisfy the third factor as several other parties in the marketplace competed more directly with the defendant.[355] It makes sense that if a defendant's more direct competitors do not bring suit, then an indirect competitor, who would be less affected by the false advertising than the direct competitors, should not have standing to sue.[356] Likewise, the plaintiff in *Conte Bros.* would fail to meet the proximity requirement of factor (3) because the plaintiff-retailer would be too disconnected from the alleged misconduct when compared to the class of persons who would be compelled to bring suit based on that misconduct—in this case, competing manufacturers.[357]

At the same time, plaintiffs in cases such as *Jack Russell* may potentially satisfy the new test for standing as long as they could show a com-

353. *Cf.* Lemley, *supra* note 44, at 316.
354. *Id.*
355. *See Joint Stock Soc'y*, 266 F.3d at 182.
356. *See* Lemley, *supra* note 44, at 304.
357. Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 234 (3d Cir. 1998).

mercial or pecuniary injury.[358] In *Jack Russell*, the plaintiffs failed the categorical test for standing because they did not compete directly with the defendant.[359] Under the new test, the plaintiffs in *Jack Russell* would meet the proximity requirement because the alleged false advertisement targeted them directly.[360] Still, under the new approach, the court in *Jack Russell* would have been free to use its discretion in determining whether the American Kennel Club's role in the controversy made it, and not the plaintiffs, the best suited party to bring a claim.[361] The new approach thus casts a wider net than the categorical approach, but the proximity requirement at factor (3) still prevents the "overenforcement" of section 43(a).[362]

The new standard also applies to cases such as *Camel Hair*, a case often cited as an example of when a noncompetitor should be granted standing.[363] The plaintiffs in *Camel Hair* would meet both factors (1) and (2) because their pecuniary interests were harmed as a result of the defendant's actions.[364] Yet the plaintiffs in *Camel Hair* did not compete with the defendant by selling coats; they instead sold noncompeting products made with the same materials.[365] Thus, the question under factor (3) would be whether competing coat manufacturers are better-suited plaintiffs. Because the suit arose out of the defendant's alleged misrepresentation of the cashmere content of its coats, it makes sense that other manufacturers and vendors who do not misrepresent the cashmere content of their clothing would have an interest in suing.[366] Thus, the defendant's false advertising would be harmful not only to other coat dealers but also to other clothing dealers who sold the same fabric, making both parties well situated to bring suit.

The new test advocated by this Note provides courts with an adequate amount of discretion and applies equally to many factually disparate scenarios beyond false advertising suits. This new approach also takes into account various competing interests to strike an optimal balance that minimizes the effects of false information in the marketplace.

358. *See* Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc., 407 F.3d 1027, 1036–37 (9th Cir. 2005).

359. *Id.* at 1037.

360. *See id.* Of course, whether the plaintiffs in *Jack Russell* would be entitled to succeed on the merits of their claim is another issue entirely.

361. *See id.* The American Kennel Club could be considered a direct competitor of the defendant in *Jack Russell*, but the AKC declined to take part in the suit. *Id.* at 1037 n.19.

362. *See* Lemley, *supra* note 44, at 303–04.

363. *See, e.g.*, Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 234 (3d Cir. 1998).

364. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 11–12 (1st Cir. 1986); *accord Conte Bros.*, 165 F.3d at 234.

365. *Camel Hair*, 799 F.2d at 12.

366. *See id.* at 7–8.

2. *The New Approach as Applied to False Endorsement Cases Brought Under Section 43(a)(1)(A)*

The standard proposed by this Note not only provides an ideal approach to standing to sue for false advertising, but also avoids the major pitfalls of the categorical approach by applying equally to suits for false endorsement. Although not the focus of this Note, the test for standing to sue for false advertising under section 43(a)(1)(B) must apply equally to suits for false endorsement under section 43(a)(1)(A). Thus, this Note briefly discusses the application of the new bright-line test to *Waits*, the most prominent false endorsement case dealing with the Ninth Circuit's dichotomous approach to standing.[367]

The categorical approach does not apply rationally to section 43(a)(1)(A) cases.[368] Conversely, the flexibility of the new bright-line standard is well demonstrated by application to the facts of *Waits*.[369] Waits would easily meet all three prongs of the new approach because (1) Waits has a pecuniary interest in the use of his identity; (2) the unauthorized use of Waits's identity is clearly connected to the damage to his goodwill and reputation, in addition to any reduction in his endorsement value; and (3) no party is better suited to bring the claim than Waits himself.[370] Therefore, the new standard applies equally to either prong of section 43(a), alleviating concerns over differing standards.

3. *The Market Effects of the New Approach*

Although there is significant contention over the underlying policy of section 43(a), courts generally agree that a major goal of section 43(a) is to prevent the dissemination of false and misleading information into the marketplace.[371] The major competing concern is efficiency, both in preventing the spread of bad or false information and in maintaining the flow of commerce.[372]

The new standard aligns the prudential standing analysis with the general policy of increasing market efficiency, allowing the "invisible hand" to limit most false advertising.[373] This result is accomplished because consumers are generally able to discover false advertising on their own and may use their buying power to purchase only goods that con-

367. *See* Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1107–10 (9th Cir. 1992).
368. *Id.*; *see supra* note 86 and accompanying text.
369. *Cf. Conte Bros.*, 165 F.3d at 236 (praising the flexibility of the balancing approach over the other two approaches).
370. *See Waits*, 978 F.2d at 1110.
371. *See* Jordan & Rubin, *supra* note 176, at 540–41; Wrona, *supra* note 2, at 1092–93.
372. *See* Jordan & Rubin, *supra* note 176, at 540–41.
373. *See* Wrona, *supra* note 2, at 1092–93 (citing ADAM SMITH, THE WEALTH OF NATIONS 477 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1776)).

form to expectations.[374] Of course, this result is not always accomplished because the effort consumers must expend to uncover good information and separate it from false advertising raises transaction costs.[375] The higher these costs become, the less effective consumers are at regulating the marketplace because, at a certain point, it is more efficient for the consumer to merely purchase a product based on unverified information than to become educated.[376] Thus, at some point, government intervention is necessary.

Section 43(a) allows parties to operate as "private attorney[s] general," vindicating the public interest through litigation.[377] But false advertising litigation has its own inherent costs.[378] For example, false advertising litigation may be exploited by an established business to prevent a new entity from entering the market.[379] Only when the transaction costs outweigh the litigation costs does allowing suit under section 43(a) make sense; otherwise, it would be more efficient to allow market forces to correct the misinformation on their own.[380] Thus, false advertising litigation should not be all-encompassing.

Instead, it makes sense to further limit standing in some cases where the plaintiff has suffered commercial harm as a result of the defendant's false advertising, even when that plaintiff competes directly with the defendant. Scholars already suggest that noncompetitors should be excluded from litigation when their interest in the defendant's acts is "exceedingly indirect."[381] The same logic should apply to competitors. Thus, the cases where it makes sense to limit standing beyond direct competitors are those in which the injury to the plaintiff is *de minimis*.

Therefore, the requirement at factor (1)—that the injury is of the type contemplated by Congress—should be construed to include only those injuries in which the harm to the injured party exceeds the costs of litigation. In other words, when the false advertising is easily corrected through consumer action, there is no need for litigation under section 43(a), and courts should deny standing.

4. The New Approach as Applied to Phoenix

Moving forward, the final question to be answered is: did the court reach the correct result in *Phoenix*? Even though the outcome of *Phoenix* seems counterintuitive, the new approach could potentially lead to

374. *Id.* at 1153–54 (suggesting that consumers "differentiat[e] between fact and fiction" to discover false advertising).
375. *Id.* at 1154.
376. *See* Jordan & Rubin, *supra* note 176, at 542–44.
377. Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 182 (3d Cir. 2001).
378. *See* Jordan & Rubin, *supra* note 176, at 544–49.
379. *Id.* at 548.
380. *See* Wrona, *supra* note 2, at 1154–55.
381. *Id.* at 1138.

the same conclusion reached by the Eleventh Circuit. Yet the real problem with *Phoenix* is not that the court denied standing, but instead that the court's decision amounted to a preemptive adjudication of the merits of the case, making the court's reasoning seem disingenuous.[382] Even if the same end result is reached, the new approach will provide a clearer path and a more predictable, rational analysis.

Applying the new test to the facts of *Phoenix*, factor (3) would clearly be met, as the Eleventh Circuit found.[383] At factor (3), Phoenix was easily the most proximate party to the alleged harm because it competed directly with McDonald's.[384] But the court derided the causal chain alleged at factor (2) as "tenuous."[385] Even under the stricter prudential causation requirement advocated by this Note, Phoenix should have been allowed to proceed because McDonald's false advertisements had a direct effect on the fast-food market.[386] The court in *Phoenix* found causation to be lacking in large part due to the number of other competitors in the market.[387] The presence of a large number of competitors alone cannot defeat standing; otherwise, businesses that compete in saturated markets would be free to falsely advertise without fear of suit, defeating the purpose of section 43(a).[388] In addition, the presence of other competitors in the market could also be taken into account through apportionment at the damages stage.[389] Thus, in a case like *Phoenix*, it is both unnecessary and imprudent to deny standing on the basis of the large number of competitors in the market.

At factor (1), Phoenix alleged harm to its pecuniary interests as a result of McDonald's false advertising.[390] Specifically, Phoenix complained that McDonald's false claims[391] attracted customers that would have otherwise dined in its establishment.[392] This harm facially meets the test of factor (1) because it is clearly both a commercial and competitive harm. Yet it seems probable that the actual injury to Phoenix was quite

382. Price, *supra* note 5, at 1364.

383. Phoenix of Broward, Inc. v. McDonald's Corp., 489 F.3d 1156, 1167–71 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1647 (2008).

384. *Id.* at 1170–71.

385. *Id.* at 1169.

386. *See id.* (describing Phoenix's allegations that it lost market share to McDonald's as a result of the false advertising).

387. *Id.*

388. WEINSTEIN & KAPLAN, *supra* note 4, at 3–4.

389. Price, *supra* note 5, at 1363–64. Another interesting approach to this problem would be to apply a variant of market share liability theory to damages. Under the facts of *Phoenix*, if a plaintiff proved a section 43(a) violation at trial, then McDonald's could be held liable for an amount of damages corresponding to its increase in sales during its false advertising campaign. Phoenix could then recover a proportional amount from this total according to its share of the market. For an in-depth discussion of the possible applications of market share liability, see Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L. REV. 151 (2004).

390. *Phoenix*, 489 F.3d at 1168–69.

391. *See* Jordan & Rubin, *supra* note 176, at 535–36.

392. *Phoenix*, 489 F.3d at 1168.

small. As noted by the court, many of the prizes offered by McDonald's were actually available and it is impossible to show that, but for the false advertising of a select few prizes, McDonald's customers would have instead eaten at Burger King.[393] Thus, much of the "injury" was not the result of false advertising but, instead, was the result of *true* advertising. This realization clarifies the fact that Phoenix's actual injury was very small and difficult to quantify. Therefore, Phoenix should have failed the standing analysis at factor (1) based on the nuance described above.

Of course, the counterargument is that McDonald's would never have offered the high-value prizes if it did not expect to draw customers away from its competition. And Phoenix suffered real damages in both lost sales and counteradvertising costs.[394] But the market had already been corrected by the time Phoenix brought suit: the government revealed McDonald's false advertising, and consumers were made aware of the false information.[395] The underlying purpose of section 43(a) is to allow a private party to vindicate the public interest by acting as a "private attorney general," so the fact that the market had been corrected defeats the need for litigation.[396] That Phoenix spent money on counteradvertising should not affect the outcome because the public interest in preventing the dissemination of false information in the marketplace had already been satisfied. Phoenix's suit was therefore redundant.

Ultimately, the court in *Phoenix* came to the correct result on the issue of standing, but for the wrong reasons. Consumers became aware of the false advertising and brought a slew of class action suits long before *Phoenix*.[397] McDonald's settled these class actions, paying out $15 million in prizes, among other things.[398] Thus, in *Phoenix*, consumer action, rather than section 43(a) litigation, corrected the market imbalance. Still, the result of *Phoenix* merely highlights the larger problems with the balancing test and illuminates the need for a new approach.

V. CONCLUSION

While many hail the balancing test as the panacea for the confusion surrounding false advertising litigation,[399] this Note shows that the balancing test is not an ideal solution. As demonstrated in *Phoenix*, the balancing test can lead to confusing, counterintuitive, and unfair decisions, a result that will further muddy the waters of Lanham Act jurisprudence.[400] This Note thus proposes that courts should adopt a new three-factor

393. *Id.* at 1169.
394. *Id.* at 1161.
395. *Id.* at 1160.
396. Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 182 (3d Cir. 2001).
397. *Phoenix*, 489 F.3d at 1160.
398. *See id.*
399. *See, e.g.*, Conte Bros. Auto. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 236 (3d. Cir. 1998).
400. *See* Kent, *supra* note 90, at 4.

bright-line standard to address the serious problems that plague each of the current approaches.

The new bright-line test proposed by this Note is a workable standard specifically designed to properly address the question of who may sue under section 43(a). The new standard eliminates the vague balancing required by the *Conte Bros.* test[401] and provides much needed clarity and predictability. Also, the new bright-line test affords courts more flexibility than the categorical approach by allowing courts to determine whether the litigant is the party best situated to bring the claim at hand, but still allowing standing to extend beyond direct competitors to any injured party, as long as no other party is more proximate to the alleged harm.

Finally, this new approach allows courts to determine whether false advertising litigation under section 43(a) makes sense when applied to the facts and circumstances of the case at bar. If the plaintiff's interest in the litigation is not to correct the market, but is instead to recover its own advertising costs or to realize some of its competitor's profits in an action for damages, alarm bells should ring. Likewise, when market forces are better equipped to correct the inequality caused by the false advertising, standing should not be allowed under section 43(a).

False information will always find its way into the marketplace. The current approach is to attack this false information at every turn with federal legislation and private litigation—much like attacking a fly with a shotgun. A more reasonable approach—the approach advocated in this Note—would be to instead use a flyswatter and, when appropriate, perhaps just open a window.

401. *See Conte Bros.*, 165 F.3d at 226.